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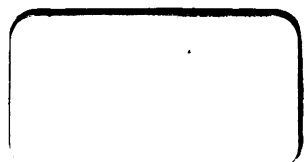
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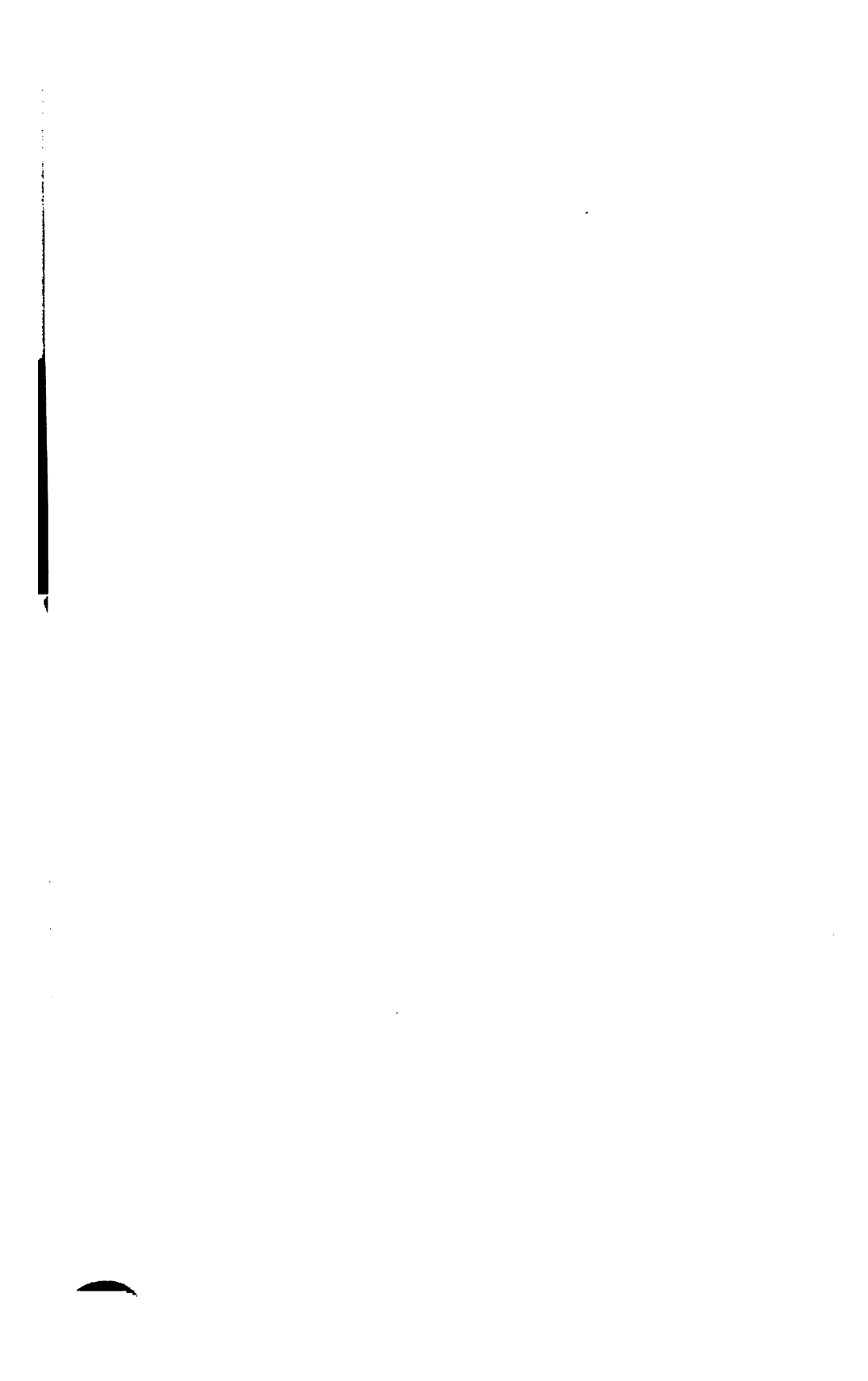
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THE BOOK OF MONOGRAPHS.

VOID EXECUTION, JUDICIAL AND PROBATE
SALES, Etc.

By A. C. FREEMAN, Esq.

THE ENFORCEMENT OF JUDGMENTS AGAINST
BANKRUPTS.

By A. C. FREEMAN, Author of "FREEMAN ON JUDGMENTS," Etc.

REMOVAL OF CAUSES
FROM STATE TO FEDERAL COURTS. SECOND EDITION.
By JOHN F. DILLON, LL. D.

CIVIL DAMAGE LAWS.
THE CIVIL REMEDY FOR INJURIES ARISING FROM THE SALE
OR GIFT OF INTOXICATING LIQUORS.
By JOHN D. LAWSON, Editor CENTRAL LAW JOURNAL.

ST. LOUIS:
THE CENTRAL LAW JOURNAL.
1877.

VOID
EXECUTION, JUDICIAL AND PROBATE
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—AND THE LEGAL AND EQUITABLE—

RIGHTS OF PURCHASERS THEREAT,

—AND THE—

CONSTITUTIONALITY OF SPECIAL LEGISLATION

VALIDATING VOID SALES AND AUTHORIZING INVOLUN-
TARY SALES IN THE ABSENCE OF JUDICIAL
PROCEEDINGS.

8-10-1877
By A. C. FREEMAN,

AUTHOR OF TREATISES ON "JUDGMENTS," "EXECUTIONS," "CO-
TENANCY AND PARTITION," ETC.

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CHAPTER I.

INTRODUCTORY.

SECTION 1. *Plan and Scope of the Work—Sundry Definitions.*—We purpose, in the following pages, to direct our attention and that of our readers to void execution and judicial sales, and the legal and equitable rights of purchasers thereat. Having considered these questions, we shall conclude with inquiries concerning the constitutionality of those curative acts and that class of special legislation, which attempt either to validate invalid judicial sales, or to authorize involuntary sales, in the absence of any judicial proceedings whatever. In the terms “judicial and execution sales,” as we here use them, are embraced all sales made in pursuance of the orders, judgments or decrees of courts, or to obtain satisfaction of such orders, judgments or decrees. Precisely what sales can accurately be denominated “judicial,” is not very well settled. Of course, they must be the result of judicial proceedings, and the order, decree or judgment on which they are based must direct the sale of the property sold. There can be no judicial sale except on a pre-existing order of sale.¹ And probably the order of sale is not, alone, sufficient to entitle the sale to be called judicial. In a state where an administrator’s sale, though made by virtue of an order of court, was not required to be reported to the court nor to be confirmed, Judge

¹ Minnesota Co. v. St. Paul Co., 2 Wall. 640.

Story held it not to be a judicial sale.² If, however, a sale is ordered by the court, is conducted by an officer appointed by, or subject to the control of the court, and requires the approval of the court before it can be treated as final, then it is clearly a judicial sale. Such a sale is unquestionably a sale by the court.³ Sales made in proceedings for partition are undoubtedly judicial;⁴ so are sales made by administrators and guardians under the practice pursued in most of the states.⁵ Execution sales are not judicial.⁶ They must, it is true, be supported by a judgment, decree or order. But the judgment is not for the sale of any specific property. It is only for the recovery of a designated sum of money. The court gives no directions and can give none concerning what property shall be levied upon. It usually has no control over the sale, beyond setting it aside for non-compliance with the directions of the statutes of the state. The chief differences between execution and judicial sales, are these: the former are based on a general judgment for so much money, the latter on an order to sell specific property; the former are conducted by an officer of the law in pursuance of the directions of a statute, the latter are made by the agent of a court in pursuance of the directions of the court; in the former the sheriff is the vendor, in the latter, the court; in the former the sale is usually complete when the property is struck off to the highest bidder, in the latter it must be reported to

² *Smith v. Arnold*, 5 Mason, 420.

³ *Forman v. Hunt*, 3 Dana, 621.

⁴ *Freeman on Co-Tenancy and Partition*, sec. 548; *Sackett v. Twining*, 18 Pa. S. 199; *Hutton v. Williams*, 35 Ala. 503; *Girard L. Ins. Co. v. F. & M. Bank*, 57 Pa. S. 388.

⁵ *Vandever v. Baker*, 13 Pa., Sec. 121; *Halleck v. Guy*, 9 Cal. 195; *Hutton v. Williams*, 35 Ala. 517; *Mason v. Osgood*, 64 N. C. 467.

⁶ *Griffith v. Fowler*, 18 Vt. 394.

and approved by the court.⁷ But our present purpose does not require us to announce any tests by which to determine what sales are judicial, nor to separate the different classes of judicial sales from one another. We shall assume that judicial sales embrace, 1st, those made in chancery; 2d, those made by executors, administrators and guardians, when acting by virtue of authority derived from orders of sale obtained in judicial proceedings; and, 3d, all other cases where property is sold under an order or decree of court designating such property and authorizing its sale. Void sales, whether execution or judicial, may, for convenience of treatment, be divided into two great classes: 1st, those which are void because the court had no authority to enter the judgment or order of sale; 2d, those which, though based on a valid judgment or order of sale, are invalid from some vice in the subsequent proceedings. The word void, though apparently free from ambiguity, is employed in various senses. Accurately speaking, a thing is not void unless it has no force or effect whatever. "A conveyance can not be said to be utterly void, unless it is of no effect whatsoever and is incapable of confirmation or ratification."⁸ "Another test of a void act or deed is, that every stranger may take advantage of it, but not of a voidable one. Again, a thing may be void in several degrees: 1, void, so as if never done, to all purposes, so that all persons may take advantage thereof; 2, void to some purposes only; 3, so void by operation of law that he that will have the benefit of it may make it good."⁹ In the terms "void sales," as employed in this work, we include all those sales which, as

⁷ *Andrews v. Scotton*, 2 Bland, 636; *Schindel v. Keedy*, 43 Md. 417.

⁸ *Boyd v. Blankman*, 29 Cal. 35.

⁹ *Anderson v. Roberts*, 18 Johns. 527.

against the original purchaser, may, without any proceedings to set them aside, be treated as not transferring the title of the property assumed to be sold. These sales, it will be shown, may be ratified or confirmed. Many of them give rise to important equitable rights in favor of the original purchaser or his grantees. Some of them, while conferring neither legal nor equitable rights on the original purchaser, become, in the hands of his innocent vendees for value, in good faith and without notice, valid both at law and in equity.

CHAPTER II.

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SECTION 2. *The Effect of Want of Jurisdiction.*—A void judgment, order or decree, in whatever tribunal it may be entered, is, in legal effect—nothing. “All acts performed under it, and all claims flowing out of it, are void.”¹⁰ Hence, a sale, based on such a judgment, has no foundation

¹⁰ Freeman on Judg'ts, sec. 117.

in law. It must certainly fall.¹¹ Judicial proceedings are void when the court, wherein they take place, is acting without jurisdiction. "The power to hear and determine a cause is jurisdiction; it is *coram judice* whenever a cause is presented which brings this power into action; if the petitioner states such a case in his petition, that on a demurrer the court would render judgment in his favor, it is an undoubted case of jurisdiction."¹² "It is in truth the power to do both or either—to hear without determining, or to determine without hearing."¹³ It must be constantly remembered that jurisdiction is indispensable to the validity of all judicial proceedings; that if the proceedings taken to obtain jurisdiction are radically defective, all subsequent steps are unavailing, however regular they may be. Thus, though the proceedings in a probate court to obtain an order of sale, and also the proceedings subsequent to the order, be all perfectly regular, yet the sale is utterly void if it can be shown that there was no valid grant of administration because the court had no jurisdiction to grant it.¹⁴

SEC. 3. *Kinds and Sources of Jurisdiction*.—"Jurisdiction is conferred upon courts by the constitution and laws of the country in which they are situate, authorizing them to hear and determine causes between parties, and to carry their judgments into effect."¹⁵ The power to hear a particular class of cases, or to determine controversies of a specified character, is called jurisdiction over the subject-matter. This jurisdiction is conferred by the "authority which organizes the court, and is to be sought for in the general nature of its powers, or in authority specially conferred by statute. If the order or judgment, on which a

¹¹ Freeman on Executions, sec. 16, note 20; Gray v. Hawes, 8 Cal. 562.

¹² United States v. Arredondo, 6 Pet. 709.

¹³ *Ex parte* Bennett, 44 Cal. 88.

¹⁴ Sumner v. Parker, 7 Mass. 79; Unknown Heirs v. Baker, 23 Ill. 490; Smith v. Rice, 11 Mass. 507; Chase v. Ross, 36 Wis. 267; Withers v. Patterson, 27 Texas, 501; *Ex parte* Barker, 2 Leigh, 719; Miller v. Jones, 26 Ala. 247. (See sec. 10.)

¹⁵ Freeman on Judg'ts, sec. 119. ,

sale was made, was one resulting from a controversy which the court had, in no circumstances, any power to determine, there was an absence of jurisdiction over the subject-matter, and the sale is incurably void."¹⁶ In addition to jurisdiction over the subject-matter, it is also indispensable that the court should have jurisdiction over the person or thing against which its judgment operates. Jurisdiction over a subject-matter must be conferred by law;¹⁷ jurisdiction over a person may be conferred by his consent. If jurisdiction over a person is not conferred by his consent, or obtained in the manner designated by law, the judgment against him is void, and can support no sale of his property.

SEC. 4. *Instances of want of jurisdiction over the subject-matter* are found more frequently in *probate proceedings* than elsewhere. If the statute of a state governing the settlement and distribution of the estates of deceased persons makes no provision concerning the estates of persons who died prior to the passage of such statute, then an attempt to administer on one of the last named estates would be usurping authority over a subject-matter not within the jurisdiction of the court, and the proceedings would therefore be invalid.¹⁸ So, if a probate court should make an order for the sale of property situate in another state than the one in which the order is made, this would also be an assumption of authority over a subject-matter not within the jurisdiction of the court, and would be void.¹⁹ This rule has been held to be applicable even where personal property, though in another state at the death of its owner, was subsequently brought within the state where the order was made.²⁰ Courts of probate have no power to

¹⁶ Freeman on Judg'ts, sec. 120.

¹⁷ Dakin v. Demming, 6 Pal. 95.

¹⁸ Downer v. Smith, 24 Cal. 114; Coppinger v. Rice, 33 Cal. 408; Grimes v. Norris, 6 Cal. 621; Adams v. Norris, 23 How. U. S. 353; Tevis v. Pitcher, 10 Cal. 465.

¹⁹ Nowler v. Coit, 1 Oh. 519; Watts v. Waddle, 6 Pet. 389; Wills v. Cowper, 2 Oh. 124; Latimer v. R. R. Co., 43 Mo. 105; Price v. Johnson, 1 Oh. St. 390.

²⁰ Varner v. Bevil, 17 Ala. 286.

grant letters of administration, nor letters testamentary, on the estate of a living person. Letters may be granted under a mistake of fact, upon the supposition that the testator, or other person, is dead. The case is nevertheless one in which the court has no jurisdiction. If he who was supposed to have died is, in fact, living, all probate sales and other proceedings are void, and can have no effect on his title.²¹ Grants of letters of administration were formerly judged to be void unless the deceased did in fact die intestate.²² Surrogate and probate courts are usually limited in their jurisdiction to a specified class of cases. Thus, it is generally required that a man's estate be settled in the county where he resided at the time of his death. If it appears that letters testamentary or of administration were granted in a county in which the deceased did not reside, the whole proceedings must be regarded as void.²³ How, and in what circumstances this fact may be made to appear, are questions to which diverse answers may be found in the

²¹ *Duncan v. Stewart*, 25 Ala. 408; *Griffith v. Frazier*, 8 Cranch, 9; *Fisk v. Norvel*, 9 Tex. 13; *Jochumsen v. Suffolk Sav. Bank*, 3 Allen. 87; *Withers v. Patterson*, 27 Tex. 496; *Beckett v. Selover*, 7 Cal. 237.

²² *Holyoke v. Haskins*, 5 Pick. 24; *Brock v. Frank*, 51 Ala. 91; *Kane v. Paul*, 14 Pet. 39; *Griffith v. Frazier*, 8 Cranch, 24. This rule is believed to be obsolete in the United States. In its stead we have adopted the rule that a grant of administration, made by a court having jurisdiction of the subject-matter and of the particular case, while it remains unrevoked, can not be regarded as void. "Nor can the recall or repeal of the appointment be fairly regarded as placing the appointees of the court in the same position as if the decree never existed. On the contrary, all acts done in the due course of administration, while such decrees remained in force, must be held entirely valid." *Redfield on Wills*, Part 2, p. 109; *Bigelow v. Bigelow*, 4 Oh. 138; *Kittredge v. Folsom*, 8 N. H. 98; *Ward v. Oakes*, 42 Ala. 225; *Jennings v. Moses*, 38 Ala. 402; *Broughton v. Bradley*, 34 Ala. 694; *Brock v. Frank*, 51 Ala. 91. But one who deals with an executor is not protected if he has notice of the existence of a later will than the one admitted to probate. *Gaines v. De La Croix*, 6 Wall. 720.

²³ *Beckett v. Selover*, 7 Cal. 215; *Haynes v. Meeks*, 10 Cal. 110; *Harlan's Estate*, 24 Cal. 182; *Moore v. Philbrick*, 32 Me. 102; *Munson v. Newson*, 9 Tex. 109; *Cutts v. Haskins*, 9 Mass. 543; *Holyoke v. Haskins*, 5 Pick. 20, and 9 Pick. 259; *Goodrich v. Pendleton*, 4 Johns. Ch. 549.

authorities. Undoubtedly the records of the court may be inspected. If they show the non-residence of the deceased, they are competent evidence of their own invalidity. If they fail to assert anything about the residence, either in the averments of the petition or in the findings of the court, we should judge this to be fatal. In every case it ought to appear, *prima facie*, that the court has jurisdiction over the estate. Usually a petition is presented to the court or judge, in which the facts authorizing the assumption of jurisdiction in the particular case are stated. The duty of the court or judge is to investigate and determine the truth of these jurisdictional allegations. Its subsequent grant of letters implies that these allegations have been found to be true. "Whenever the jurisdiction of a court not of record depends on a fact which it is required to ascertain and settle by its decision, such decision, if the court has jurisdiction of the parties, is conclusive, and not subject to any collateral attack."²⁴ Hence, in a case where a probate court has, upon a petition asserting the essential jurisdictional facts, and after notice to the parties in interest, given, in the manner prescribed by law, granted letters testamentary or of administration, the proceedings can not be avoided collaterally, in the majority of the states, by proof that the deceased did not die within the jurisdiction of the court.²⁵ Any other rule would lead to the most embarrassing results. The residence of a deceased person can be determined only by hearing parol evidence. Different judges may reach opposite conclusions from the same evidence. The parties in interest may at separate times produce different evidence on the same issue. If, after a court had heard

²⁴Freeman on Judg'ts, sec. 523.

²⁵Irwin v. Scribner, 18 Cal. 499; Lewis v. Dutton, 8 How. Pr. 103; Andrews v. Avery, 14 Gratt. 236; Warfield's Estate, 22 Cal. 51; Sutton v. Sutton, 13 Vt. 71; Fisher v. Bassett, 9 Leigh, 119; Barrett v. Garney, 33 Cal. 530; Driggs v. Abbott, 27 Vt. 581; Burdett v. Silsbee, 15 Tex. 615; Monell v. Dennison, 17 How. Pr. 422; Abbott v. Coburn, 28 Vt. 663; Rarborg v. Hammond, 2 H. & G. 42. See also Riley v. McCord, 24 Mo. 265; Wight v. Wallbaum, 39 Ill. 554.

and decided the issue concerning the residence of the deceased, the question remained unsettled to such an extent that it could be re-litigated for the purpose of avoiding all the proceedings of the court, no person would have the temerity to deal with executors or administrators.

SEC. 5. *Methods of Acquiring Jurisdiction.*—Jurisdiction over a complainant is obtained by his coming before the court and making his complaint in a manner recognized by law. This is usually by a statement in writing, filed in the court or with the clerk thereof. Jurisdiction over the defendant is obtained by his voluntary appearance in the action, or by the service of process upon him. Jurisdiction over a thing proceeded against *in rem* is acquired by its seizure under the process of the court.²⁶ If a defendant neither appears, nor is served with process, a judgment against him is void. If, however, he is served with process which is irregular in form, or the mode of service is irregular, he must generally object to such irregularity; if he fails to do so, and judgment is entered against him, it will generally not be treated as void, when collaterally assailed.²⁷ When letters testamentary or of administration on the estate of a deceased person, or of guardianship upon the person or estate of a lunatic or minor, are applied for, such measures as the statutes require must be taken for the purpose of obtaining jurisdiction over the persons interested. The statute may authorize the court to proceed without notice to anyone. The proceeding may be *in rem*. But if notice is exacted by the statute, either by publication, or by the personal service of a citation, a substantial compliance with the statute is a prerequisite to obtaining authority to proceed.²⁸

SEC. 6. *Where the Judge is Disqualified from Acting.*—Sometimes a court has jurisdiction, both over the person

²⁶ Cooper v. Reynolds, 10 Wall. 308; Galpin v. Page, 1 Cent. L. J. 491; 1 Saw. 309; 18 Wall. 350; Freeman on Judg'ts, secs. 606 and 611.

²⁷ Freeman on Judg'ts sec. 126; Hanks v. Neal, 44 Miss. 224; Stampley v. King, 51 Miss. 728.

²⁸ Randolph v. Bayue, 44 Cal. 370; Beckett v. Selover, 7 Cal. 215.

and the subject-matter, but can not proceed because the judge thereof is disqualified from acting in the particular case. If, however, he proceeds, when incompetent by statute, his judgment or order is, in most states, invalid. For the purpose of trying or determining the particular matter, he is not a judge.²⁹

SEC. 7. *Suspension or Loss of Jurisdiction.*—A court or judge having authority to proceed at one time may be divested of its jurisdiction, either temporarily or permanently. The court may be abolished, or its jurisdiction may be divested by statute. The proceedings may be removed into some appellate tribunal. The term of the court may be adjourned *sine die*; in which case no judgment can be entered before the re-opening of the court at its next term, unless expressly authorized by statute. In all cases where a court is rendered incompetent to proceed, its proceedings during such incompetency are as invalid as though it had never possessed jurisdiction.³⁰ If a probate court appoints an executor or administrator, it can not, while he continues in office, appoint another. Its jurisdiction is exhausted. Its further grant of letters is void.³¹ Neither can it appoint another administrator after an estate has been fully administered upon, and distributed to the heirs.³² Where a statute forbade the administration upon the estates of persons who had been dead for more than twenty years, a grant of administration in defiance of the statute was adjudged void.³³ If notice is given that a petition for the sale of lands will be presented at a time specified, and it is not then presented, the person interested in opposing it may regard it as abandoned. The court has no authority to

²⁹ Freeman on Judg'ts, sec. 145; Sigourney v. Sibley, 21 Pick. 101; Coffin v. Cottle, 9 Pick. 287; Hall v. Thayer, 105 Mass. 219; Gay v. Minot, 3 Cush. 352.

³⁰ Freeman on Judg'ts, sec. 121.

³¹ Griffith v. Frazier, 8 Cranch, 9; Flinn v. Chase, 4 Den. 90.

³² Fisk v. Norvel, 9 Tex. 13.

³³ Wales v. Willard, 2 Mass. 120.

hear it without giving a new notice.³⁴ But if the failure to present the application arises from the fact that the term of court is not opened, no presumption of abandonment can be indulged. The petition may, it has been held, be presented at the next term without any new notice.³⁵

SEC. 8. *General Principles Governing Jurisdictional Inquiries.*—In attempting to decide whether a judicial, execution, or probate sale can be avoided on the ground that the court entering the judgment or order of sale did not have jurisdiction over the person of the defendant, the first inquiry will be to ascertain whether the court was a court of general jurisdiction, or a court of special or limited jurisdiction, or, in other words, whether it is a court of record, or one not of record. This inquiry must be conducted chiefly in the statutes of the state. If the court is a court of record, this jurisdictional question can, in most states, be decided with comparative ease. Courts of record are presumed to act correctly. When a court of record has entered judgment, its jurisdiction over the defendant is presumed, unless its record shows the contrary.³⁶ If, however, the record shows what was done toward acquiring jurisdiction, nothing else will be presumed to have been done.³⁷ An apparent exception to this rule is where the return on the summons shows an insufficient or void service, and the judgment or decree contains recitals or findings in favor of the jurisdiction of the court. In this case the recital or finding prevails. The court is presumed to have had other evidence than that contained in the return on the summons.³⁸ If the record shows that the court acquired jurisdiction of the defendant, or even if it is silent on that subject, jurisdiction will always be presumed.³⁹ In most

³⁴Turney v. Turney, 24 Ill. 625; Gibson v. Roll, 30 Ill. 172; Morris v. Hogle, 37 Ill. 150. See also Freeman on Judg'ts, sec. 526.

³⁵Hanks v. Neal, 44 Miss. 224.

³⁶Freeman on Judg'ts, sec. 124.

³⁷Ib., sec. 125; Moore v. Starks, 1 Oh. S. 372; Benson v. Cilley, 8 Oh. S. 613.

³⁸Freeman on Judg'ts, sec. 130.

³⁹Freemann oe Judg'ts, secs. 131, 132, 134.

states the presumption is conclusive, but in some a collateral attack may be made; and if, from such attack, it appears that the defendant was never brought before the court, the judgment will be held void.⁴⁰ In a majority of the states, if the proceeding is under some special statute and in derogation of the common law, the jurisdictional presumptions in favor of a court of record are not indulged. The inquiry must be conducted as though the court were not a court of record.⁴¹ If the court is one not of record, great care must be taken to see that every act essential to jurisdiction has been performed,⁴² and performed in a proper manner.⁴³ No presumptions are indulged in favor of the jurisdiction of a court not of record. Its jurisdiction must always be shown affirmatively.⁴⁴ According to many of the authorities, it must be shown from the papers, files and proceedings in the case.⁴⁵ On the other hand, the fact that these show jurisdiction is not conclusive. They are not records importing absolute verity. They may be contradicted.⁴⁶ The courts having the administration of the estates of deceased or of incompetent persons are, in some states, of general, and in others of limited or special jurisdiction. Probably, in the majority of the states, they are of the latter class. Where this is the case, he who claims title under these courts must show affirmatively (and generally from their records and files) the taking of every step essential to jurisdiction.⁴⁷ Nothing will be presumed in his favor. But in several of the states these courts are either courts of record, or are, by statute, placed on the same footing as

⁴⁰ *Ib.*, sec. 133.

⁴¹ *Ib.*, secs. 123, 127.

⁴² *Ib.*, sec. 517.

⁴³ *Ib.*, sec. 521.

⁴⁴ *Ib.*, secs. 517, 527.

⁴⁵ *Ib.*, sec. 518.

⁴⁶ *Ib.*, sec. 517.

⁴⁷ *Gwin v. McCarroll*, 1 S. & M. 351; *Rigney v. Coles*, 6 Bosw. 479; *Fell v. Young*, 63 Ill. 106; *Taylor v. Walker*, 1 Heisk. 734; *Gibbs v. Shaw*, 17 Wis. 201; *Root v. McFerrin*, 37 Miss. 17.

courts of record, with reference to jurisdiction, and are presumed to have acquired jurisdiction over all parties in interest, except where their records and proceedings indicate the contrary.⁴⁸

ORDERS OF SALE IN PROBATE AND HOW AUTHORITY TO MAKE
MUST BE OBTAINED.

SEC. 9. *Probate Sales without License of the Court; when Valid and when Void.*—In execution and chancery sales, jurisdictional inquiries need to be prosecuted with much less care and frequency than in the consideration of sales made by executors, administrators or guardians. In a suit in equity, or an action at law, if the complaint discloses a cause which the court was competent to entertain and decide, and the record shows that jurisdiction was obtained over the persons of the defendants, it is generally safe to forego all further jurisdictional inquiries. But in probate proceedings, jurisdictional inquiries are material at almost every stage, and to be inattentive to them is to be guilty of rash imprudence. The application for letters testamentary, or of administration, the citation to the parties in interest, the hearing of the proofs and the order made thereon, correspond substantially to the complaint, the issue and service of process, and the trial and judgment at law. But here the case at law ends, while the case in probate is but scarcely commenced. What makes the probate proceeding still more perilous is, that a clear case of jurisdiction at this stage is not sufficient to support subsequent proceeding tending to divest the title of the heirs. At each subsequent stage, where the interest of the heir is sought to be affected, petitions and citations are usually exacted; and, in most courts, are treated as being jurisdictional in their nature. In some circumstances an executor, administrator, or guardian, may sell property without obtaining

⁴⁸Doe v. Bowen, 8 Ind. 197; Gerrard v. Johnson, 12 Ind. 636; Doe v. Harvey, 3 Ind. 104; Spaulding v. Baldwin, 31 Ind. 376; Valle v. Fleming, 19 Mo. 454.

leave from the court. Where the statute has not adopted a different rule, "the whole personal estate of the testator or intestate rests in his executor or administrator;"⁴⁹ and "an executor or an administrator has an absolute power of disposal over the whole personal effects of the testator or intestate, and they can not be followed by creditors, much less by legatees, either general or special, into the hands of an alienee. The principle is, that the executor or administrator, in many instances, must sell in order to perform his duty in paying debts, etc., and no one would deal with him if liable afterwards to be called to an account."⁵⁰ Where the common law rules upon the subject still prevail, a guardian, though not vested with any estate in the personal property of his ward, has an ample power of disposition over it. "Though it be not in the ordinary course of the guardian's administration to sell the personal property of his ward, yet he has the legal right to do it, for it is entirely under his control and management, and he is not obliged to apply to court for direction in every particular case. The question as to the due exercise of the power arises between the guardian and his ward; and I apprehend that no doubt can be entertained as to the competency of the guardian's power over the disposition of the personal estate, including the choses in action, as between him and a *bona fide* purchaser."⁵¹ So an executor might, at common law, and may, under the statutes of most of our states, sell real estate devised to him by the testator, or over which the will gives him a power of sale.⁵²

⁴⁹ 1 Lomax on Executors, 2d ed. 367; Goodwin v. Jones, 3 Mass. 518; Hays v. Jackson, 6 Mass. 152.

⁵⁰ 1 Lomax on Executors, 2d ed. 560; Overfield v. Bullitt, 1 Mo. 749; Williamson v. Branch Bank, 7 Ala. 906; Bland v. Muncaster, 24 Miss. 62; Nugent v. Gifford, 1 Atk. 463. An administrator may sell, without an order of court, a term of 999 years, for that is personalty (Petition of Gay, 5 Mass. 419); but not the estate of a mortgagee, for that is realty. *Ex parte Blair*, 13 Met. 126.

⁵¹ Field v. Schieffelin, 7 Johns. Ch. 153; Tuttle v. Heavy, 59 Barb. 334; Tyler on Infancy and Coverture, 261-2.

⁵² 1 Lomax on Executors, 2d ed. 384, 402, 560, and authorities in the next citation.

The power of a testator to authorize his executor to sell his real or personal estate without applying to court for permission, is generally conceded, though in some of the states such sales must be reported to and approved by the court.⁵³ The nomination of certain persons as executors, and investing them with power to sell the testator's real estate at their discretion, and without any license from the court, indicates that the testator has unusual confidence in the fidelity and sagacity of the persons so nominated and empowered. This unusual and somewhat irresponsible authority may, in the judgment of the testator, be safely and even advantageously conferred on the executors named in the will, but it is hardly probable that he would wish to see any other persons invested with it. Hence, where persons named as executors and invested with powers of sale, have declined, or been unable to act, it has been held that the special confidence reposed in them by the will could not be vested in any other person, and that the administrator with the will annexed had no power to make sales, except by permission of the court.⁵⁴ But, in a majority of cases, these considerations have not prevailed. The persons appointed in place of those named by the testator have been regarded as competent to execute all the powers delegated by the will.⁵⁵ Except where authorized to do so by a will, or by some statute, neither an administrator, an executor, nor a guardian can sell real estate without a license or order of sale from the court. A sale made without such license or order of court is not a mere error or irregularity which must be objected to by some proceeding in the court where the license ought to have been sought and granted; and,

⁵³ *Delaney's Estate*, 49 Cal. 77; *Jackson v. Williams*, 50 Ga. 553; *Durham's Estate*, 49 Cal. 491; *Crusoe v. Butler*, 36 Miss. 170; *Bartlett v. Sutherland*, 24 Miss. 395; *Going v. Emery*, 16 Pick. 107; *Payne v. Payne*, 18 Cal. 291; *Larco v. Casaneuava*, 30 Cal. 567; Cal. Code C. P., sec. 1561.

⁵⁴ *Tippett v. Mize*, 30 Tex. 361.

⁵⁵ *Peebles v. Watt's Adm'r*, 9 Dana, 103; *Kidwell v. Brummagin*, 32 Cal. 438; *Steele's Ex'r, v. Moxley*, 9 Dana, 139; 1 *Wagner's Stat. of Mo.*, p. 93, sec. 1; *Gulley v. Prather*, 7 Bush, 167.

which, if not so objected to, is waived or ratified. It is a proceeding without any legal support. A conveyance made in pursuance of it has no force whatever. It may be shown to be void when collaterally attacked. In fact, no attack, collateral or otherwise, need be made.⁶⁶ The claimant under the sale could not show a *prima facie* case. In many of the states the power of guardians, executors and administrators over personal property does not extend to its transfer without leave of the court. An attempted transfer, made without such leave is, in such states, void.⁶⁷

SEC. 10. *Petition for Order of Sale must be by a Person Competent to Present it.*—We now pass to the most numerous class of probate sales—those which must be sanctioned by a pre-existing order of court. This order must, in turn, be supported by certain pre-existing facts. In fact, the order of sale bears more resemblance to a judgment obtained in a new action, than to an order made in a pre-existing proceeding in which jurisdiction has already been acquired. To obtain an order of sale, a petition or complaint must be filed, a citation or notice must be issued and served, and a complete adversary proceeding conducted. Any jurisdictional defects in this proceeding are as fatal as if connected with the original grant of administration. And, what is worse, defects which, in actions at law, would be treated as mere errors, are, in probate proceedings, counted as incurable jurisdictional infirmities. If a complaint in an action at law, or in a suit in equity, does not state facts sufficient to entitle the complainant to relief, its deficiency must be pointed out, or a judgment or decree is likely to be entered which, though reversable on

⁶⁶ Tippet v. Mize, 30 Tex. 361; Beard v. Rowan, 1 McLean, 135; Robinson v. Martel, 11 Tex. 149; Low v. Purdy, 2 Lans. 422; Anderson v. Turner, 3 A. K. Marsh. 131; French v. Currier, 47 N. H. 88; Hite v. Taylor, 3 A. K. Marsh. 353; Goforth v. Longworth, 4 Oh. 129; Jackson v. Todd, 1 Dutch. 121; Gelstrop v. Moore, 26 Miss. 206; Bell's Appeal, 66 Pa. St. 498.

⁶⁷ Kendall v. Miller, 9 Cal. 591; De La Montagnie v. Union Ins. Co., 42 Cal. 291.

appeal, is valid until so reversed. If the complaint were filed by some one having no capacity to maintain the suit or action, that incapacity would be called to the attention of the court in some manner; or, if that were not done, a judgment would probably be entered in favor of plaintiff, and this judgment would not be void. But the presentation of a petition in probate by a person authorized to so petition is a jurisdictional fact. If it be presented by some one not qualified to present it, there is no jurisdiction—no power to hear and determine it. If the court erroneously grants the prayer of the petition, there need be no appeal—the order is void and can not support a sale.⁵⁸ In the case of two or more acting executors or administrators, a petition for an order of sale, preferred by any less than the whole, is irregular, but probably is not so worthless that the court can base no valid action upon it.⁵⁹ If the petition is by a person acting as administrator, but he has never qualified as such,⁶⁰ or is a special administrator not authorized by law to present the petition or make the sale,⁶¹ or it appears from the whole record of the probate proceedings that his appointment was illegal, then the license and the sale based thereon are both void.⁶²

SEC. 11. *There must be a Sufficient Petition for License to Sell—What Petitions are Insufficient.*—As in an action at law, the declaration should aver the facts entitling the plaintiff to judgment, so in a petition in probate, for authority to sell property, the matters necessary to justify the sale must

⁵⁸ *Miller v. Miller*, 10 Tex. 319; *Washington v. McCaughan*, 34 Miss. 304.

⁵⁹ *Fitch v. Witbeck*, 2 Barb. Ch. 161; *Gregory v. McPherson*, 13 Cal. 578; *Downing v. Rugar*, 21 Wend. 178. See, as sustaining petitions by one administrator only, *Jackson v. Robinson*, 4 Wend. 437; *De Bardela-ben, v. Stoudenmire*, 48 Ala. 643.

⁶⁰ *Pryor v. Downey*, 50 Cal. 389.

⁶¹ *Long v. Burnett*, 13 Iowa, 28.

⁶² *Frederick v. Pacquette*, 19 Wis. 541; *Sitzman v. Pacquette*, 13 Wis. 291; *Chase v. Ross*, 36 Wis. 267; *Sumner v. Parker*, 7 Mass. 79; *Withers v. Patterson*, 27 Tex. 501; *Ex parte Barker*, 2 Leigh, 719; *Miller v. Jones*, 26 Ala. 247. † See *ante*, sec. 2.

be set forth. In truth, this necessity seems to be more imperative in the case of the petition than in that of the declaration. The judgment of a court of law can rarely, if ever, be treated as void because pronounced upon an insufficient complaint. An order in probate must be supported by a petition sufficient in substance to show a legal cause for the order. A license to sell granted without any petition therefor is void.⁶³ But a mere petition is not enough. The statutes of each state designate the contingencies in which the real estate of a deceased or incompetent person may be ordered to be sold. The probate courts have no power to license a sale in the absence of these contingencies. The statute prescribes the limit of the judicial authority. Action beyond this limit is not irregular or erroneous merely;—it is non-judicial. If the causes of sale designated by statute are too few, relief must be sought from the legislature. An order of sale made to accomplish a purpose not sanctioned by statute, or based upon a necessity not recognised by statute, is, in legal effect, *coram non jndice*. It can not justify a sale made in pursuance of its directions.⁶⁴ The theory of the law is that the probate courts have no general authority to dispose of the estate in process of administration; that their power of disposition is special and limited, and that he who relies upon the power must disclose a state of facts sufficient to call it into being. It is also essential that the petition state a sufficient cause of action. The order of the court is based upon the petition, and can not draw its support from beyond the petition, unless the statute otherwise provide. If the peti-

⁶³ Alabama Conference v. Price, 42 Ala. 39; Wyatt's Adm'r v. Rambo, 29 Ala. 510; Finch v. Edmondson, 9 Tex. 504. But in Withers v. Patterson, 27 Tex. 499, and in Alexander v. Maverick, 18 Tex. 179, it was intimated that the absence of a petition might not be fatal.

⁶⁴ Bompert v. Lucas, 21 Mo. 598; Farrar v. Dean, 24 Mo. 16; Newcomb v. Smith, 5 Oh. 448; Withers v. Patterson, 27 Tex. 499; Strouse v. Drennan, 41 Mo. 298; Beal v. Harmon, 38 Mo. 435; Ikelheimer v. Chapman, 32 Ala. 676; Sanford v. Granger, 12 Barb. 392; Woodruff v. Cook, 2 Edw. Ch. 259; Cornwall's Estate, 1 Tucker, 250; Hall v. Chapman 35 Ala. 553.

tion states no cause of sale, it would not be competent to prove, in support of the sale, that the court in fact received evidence of facts not relied upon by the petition, and that its action was in fact induced by proof of the causes of sale omitted from the petition but specified in the statute.⁶⁵ Some of the statutes designate, in general terms, the purposes for which a sale may be licensed, and declare that the application for such license must be in writing and must show the necessity for the sale. Other statutes enumerate with considerable particularity the matters to be inserted in the petition. Even where the statute does not contain any special enumeration of the matters to be stated, it is evident that a petition may be fatally defective: 1st, when it seeks an improper object; as, for instance, the sale of property for a supposed benefit to the estate, when the statute authorizes a sale for no such purpose; and, 2d, when a proper object is sought, but the sale is not shown to be necessary to obtain it, as where a sale is asked to pay debts, but no debts are shown to exist, or the deficiency of personal assets with which to pay the debts is not affirmed. "A long series of decisions in this state—uniformly holding to the same rule—has determined that the application of an executor or administrator for the sale of lands belonging to the estate is a special and independent proceeding; that the jurisdiction of the probate court depends absolutely on the sufficiency of the petition; in other words, on its substantial compliance with the requirements of the probate act. Though the proceeding for the sale occurs in the general course of administration, it is a distinct proceeding in the nature of an action, in which the petition is the commencement and the order of sale is the judgment. The necessity for a sale is not a matter for the administrator or executor to determine, but is a conclusion which the court must draw from the facts stated, and the petition must furnish materials for the judgment."⁶⁶ The policy of

⁶⁵ Pryor v. Downey, 50 Cal. 389.

⁶⁶ Pryor v. Downey, 50 Cal. 398; Haynes v. Meeks, 20 Cal. 288; Gregory

the law has always been in favor of preserving the real estate of heirs. Hence, if any necessity arises for the raising of money, resort must first be had to the personal estate of the heir or ward. It is not probable that a petition for the sale of real estate would give jurisdiction to any probate court in the Union, if it failed to show that the personal estate was either exhausted or was insufficient to produce the requisite funds.⁶⁷ By a statute of New York, an administrator, suspecting the personal estate of the deceased to be insufficient to pay the debts, was required to make an account of such personal estate and deliver it to the judge of the court of probate, or the surrogate of the county, and request his aid in the premises. Thereupon, an order issued to the persons interested, to show cause why the real estate should not be sold. The account, being essential to showing the deficiency of personal assets, was treated as jurisdictional. A sale, in its absence, was always held void.⁶⁸ In most states the proceedings for the sale of real estate are adversary proceedings. In such proceedings parties defendant, as well as plaintiff, are essential. As the heirs occupy the position of defending parties, the petition should show who they are, in order that they may be brought into court.⁶⁹ The failure to name them has been held fatal.⁷⁰ The petitioner can not, at the hearing, abandon

v. McPherson, 13 Cal. 562; Hall v. Chapman, 35 Ala. 553; Jackson v. Robinson, 4 Wend. 436; Fitch v. Miller, 20 Cal. 352. But by section 1518 Code Civil Procedure of California, "a failure to set forth the facts showing the sale to be necessary will not invalidate the subsequent proceedings, if the defect be supplied by the proofs at the hearing, and the general facts showing the necessity be stated in the order directing the sale." See also sec. 1537 Cal. C. C. P.

⁶⁷ Gregory v. Tabor, 19 Cal. 397; Stuart v. Allen, 16 Cal. 473; Wattles v. Hyde, 9 Conn. 10.

⁶⁸ Bloom v. Burdick, 1 Hill, 130; Corwin v. Merritt, 3 Barb. 341; Ford v. Walsworth, 15 Wend. 450; Jackson v. Crawfords, 12 Wend. 533; Atkins v. Kinnan, 20 Wend. 241; Wood v. McChesney, 40 Barb. 417. See Forbes v. Halsey, 26 N. Y. 53.

⁶⁹ Morris v. Hogle, 37 Ill. 150; Hoard v. Hoard, 41 Ala. 590; Turney v. Young, 22 Ill. 253.

⁷⁰ Guy v. Pierson, 21 Ind. 18. *Contra*, that the omission of the names

the grounds stated in his petition and obtain a license to sell on some other ground. A court having jurisdiction of a petition for a sale to pay debts, can not thereon grant a valid license to sell to promote the interest of the heirs.⁷¹ The property sought to be sold must generally be described in the petition. No jurisdiction is obtained over that which is not described. A license to sell the whole of the real estate of a decedent, based on a petition to sell a part, is void.⁷² But a description will not be inadequate to support the order of sale, if it is such as would be sufficient in a conveyance, or as is rendered intelligible by the aid of facts of which the court has judicial knowledge.⁷³ The petition need not state, in Missouri, that the property belonged to the decedent.⁷⁴

SEC. 12. *Statutes Designating what Petition for Order of Sale must Contain.*—Where a statute enumerates the matter to be contained in the petition for the sale of real estate, its object is to compel petitioners to disclose the supposed necessity of the sale, and also to furnish information which will aid the court in determining upon the best course of action in case it finds a sale to be necessary. The statute of California exacts more than any other which has come under our observation.⁷⁵ It requires a verified petition setting forth: 1, the amount of personal property that has come into the hands of the administrator and how much remains undisposed of; 2, the debts of the decedent; 3, the

of the heirs is an irregularity merely: *Gibson v. Roll*, 27 Ill. 92; *Stow v. Kimball*, 28 Ill. 106; *Morris v. Hogle*, 37 Ill. 150.

⁷¹ *Williams v. Childress*, 25 Miss. 78.

⁷² *Verry v. McClellan*, 6 Gray, 535; *Tenny v. Poor*, 14 Gray, 502.

⁷³ *Smitha v. Flournoy*, 47 Ala. 345. "Southeast quarter of sect. 19 T. 12:9" is fatally defective as a description. *Weed v. Edmonds*, 4 Ind. 468. "Section 12 T. 17 R. 21" was held sufficient in *Wright v. Ware*, 50 Ala. 549.

⁷⁴ *Trent v. Trent*, 24 Mo. 307.

⁷⁵ C. C. P. of Cal., sec. 1537. See also *Hurd's Stat. of Ill.*, pp. 121, 123; *Dassler's Stat. of Kans.*, sec. 2027; *Comp. Laws Mich.* 1871, p. 1424, sec. 4546; 1 *Biss. Stat. of Minn.*, p. 673, sec. 178; *Wag. Stat. Mo.*, pp. 94, 96, secs. 10, 25.

amount due or to become due on the family allowance; 4, the debts, expenses and charges of administration accrued and to accrue; 5, a general description of all the real property of which the decedent died seized, or in which he had any interest, or in which the estate has acquired any interest, and the condition and value thereof, and whether the same be community or separate property; 6, the names of the heirs, legatees and devisees of the deceased, so far as known to the petitioner. If any of the matters here enumerated can not be ascertained, it must be so stated in the petition.⁷⁶ Whenever the question has arisen, the Supreme Court of this State has decided that the power of the probate court to order a sale depended upon a petition in substantial compliance with the statute.⁷⁷ In Missouri, if any person die and his personal estate be insufficient to pay his debts and legacies, his executor or administrator shall present a petition stating the facts.⁷⁸ The petition shall be accompanied by a true account of his administration; a list of debts due to and by the decedent, and remaining unpaid, and an inventory of the real and personal property, with its appraised value, and all other assets.⁷⁹ It seems now to be settled, in that State, that the jurisdiction of the court attaches on the filing of the petition, and that the omission of the accounts and lists, required by statute to accompany it, is not fatal.⁸⁰ In Wisconsin, and several other states, the statute provides that sales shall not be avoided on account of any irregularity, if it appears:

⁷⁶ C. C. P. of Cal., sec. 1537.

⁷⁷ Gregory v. McPherson, 13 Cal. 562; Stuart v. Allen, 16 Cal. 473; Townsend v. Gordon, 19 Cal. 188; Gregory v. Taber, 19 Cal. 397; Haynes v. Meeks, 20 Cal. 288; Fitch v. Miller, 20 Cal. 352; also, to same effect, Ackley v. Dygert, 33 Barb. 190; Bree v. Bree, 51 Ill. 367.

⁷⁸ 1 Wag. Stat. of Mo., p. 94, secs. 10, 11.

⁷⁹ 1 Wag. Stat. of Mo., p. 94, sec. 22.

⁸⁰ Overton v. Johnson, 17 Mo. 442; Mount v. Valle, 19 Mo. 621; Grayson v. Weddle, 63 Mo. 523; Pattee v. Thomas, 58 Mo. 163. These cases, we think, are, in principle, directly opposed to the New York cases—Bloom v. Burdick, 1 Hill, 130; Ford v. Walsworth, 15 Wend. 450; Jackson v. Crawfords, 12 Wend. 533.

1, that the executor, administrator or guardian was licensed to make the sale by the probate court having jurisdiction; 2, that he gave a bond on the granting of the license; 3, that he took the oath as prescribed by statute before making the sale; 4, that he gave the notice of the sale; and, 5, that the premises were sold in good faith and the sale confirmed. Under this statute, sales based on defective petitions are held valid.⁸¹

SEC. 13. *Petitions for Sale liberally Construed—When other Papers may be Referred to.*—The rule of law that declares void probate sales based on insufficient petitions, is very harsh in its operation. To avoid the necessity of applying the rule, the courts will construe petitions as liberally as possible. They will not require the use of the exact language of the statute; they will forgive all errors of form; they will regard it as sufficient if the matters stated are substantially those required to be stated; and, in interpreting the language used, they will seek to find in it something to support, rather than to destroy the title based on the probate proceedings.⁸² In drafting the petition, reference may be had to some other paper on file, and, by such reference, this paper may be made a part of the petition. The petition, for instance, may state that a full description of the real and personal estate can be ascertained from the inventory on file. Where this is done, it will be sufficient that this jurisdictional fact appears from the inventory.⁸³ But, to justify a reference to the inventory or other paper on file, "it must have been referred to in the

⁸¹ Reynolds v. Schmidt, 20 Wis. 374; Mohr v. Tulip, 40 Wis. 66; Mohr v. Manierre 9 C. L. N. 270; 1 Biss. Stat. Minn., p. 680, sec. 223; Coon v. Fry, 6 Mich. 506; Woods v. Monroe, 17 Mich. 238.

⁸² Morrow v. Weed, 4 Ia. 77; King v. Kent's heirs, 29 Ala. 542; Moffitt v. Moffitt, 69 Ill. 641; De Bardelaben v. Stoundenmire, 48 Ala. 643; Fitch v. Miller, 20 Cal. 382; Haynes v. Meeks, 20 Cal. 315; Wright v. Ware, 50 Ala. 549; Maurr v. Parrish, 26 Oh. Stat. 636; Wing v. Dodge, 80 Ill. 564; Bowen v. Bond, 80 Ill. 351.

⁸³ Bentz's Est., 36 Cal. 687; Stuart v. Allen, 16 Cal. 501; Sheldon v. Wright, 7 Barb. 47.

petition so as to become a part of it for the purpose of reference."⁸⁴

SEC. 14. *Petition need not be True.*—The jurisdiction of the court over the subject-matter attaches on the filing of a petition sufficient in form. The matter stated in the petition may or may not be true. The functions of the court are of such a character that it may inquire into the truth or falsity of the petition. The petition may be regarded as a complaint. The heirs, when jurisdiction over them is obtained, may be treated as entering a general denial. The order of the court, granting or refusing the prayer of the petition, is in the nature of a judgment conclusively establishing that the sale is or is not necessary. If erroneous, it must be corrected by appeal, or some other appropriate proceeding. It can not be collaterally avoided by showing that the petition was false.⁸⁵

SEC. 15. *Cases holding that no Notice is Necessary.*—We have already spoken of the proceeding in probate to obtain a sale of real estate, as an independent, adversary proceeding *in personam*. If it be, in fact, such a proceeding, then the defendants must be brought before the court by something which is equivalent to the service of process, and given an opportunity of resisting, in case they deem resistance proper to be made. Nearly all the statutes require some order to show cause against the petition, to issue and to be served on the parties in interest, either personally or by publication. In a few of the states this requirement is not jurisdictional. The purchaser need not, in those states, ask whether the notice to show cause against the petition was or was not given. The sale is valid if supported by a sufficient petition and an order of sale made thereon. "On a proceeding to sell the real estate of an indebted estate,

⁸⁴ Gregory v. Taber, 19 Cal. 409.

⁸⁵ Jackson v. Crawfords, 12 Wend., 533; Fitch v. Miller, 20 Cal. 382; Stuart v. Allen, 16 Cal. 473; Haynes v. Meeks, 20 Cal. 288; McCauley v. Harvey, 49 Cal. 497; Grignon's lessee v. Astor, 2 How. U. S. 339; Bowen v. Bond, 80 Ill. 351; Grayson v. Weddle, 63 Mo. 523.

there are no adversary parties, the proceeding is *in rem*, the administrator represents the land; they are analagous to proceedings in the admiralty, where the only question of jurisdiction is the power of the court over the thing—the subject-matter before them—without regard to the persons who may have an interest in it; all the world are parties. In the Orphan's Court, and all courts who have power to sell the estates of intestates, their action operates on the estate, not on the heirs of the estate; a purchaser claims, not their title, but one paramount. The estate passes to him by operation of law. The sale is a proceeding *in rem*, to which all claiming under the intestate are parties."⁸⁶

SEC. 16. *Notice of Petition—Cases holding it Indispensable.*—A very decided majority of the authorities is opposed to the principles stated in the preceding section. This majority declares that the proceeding, to obtain an order to sell real estate, is a new and independent proceeding *in personam*, in which the petitioner is the plaintiff, the petition is the complaint, the parties whose property is to be sold are the defendants, and the order to show cause, or the notice to appear is the summons; that the defendants are not in court until this summons is served, or its service has been waived by persons competent to waive it; and that whenever it is conceded or shown that any person interested was not summoned to appear, substantially as provided by statute, the whole proceeding, as against him, is utterly void.⁸⁷ The administrator, as such, has no control over the

⁸⁶ Grignon's Lessee v. Astor, 2 How. U. S. 338; Beauregard v. New Orleans, 18 How. U. S. 497; Comstock v. Crawford, 3 Wall. 396; Tongue v. Morton, 6 H. & J. 21; McPherson v. Cundiff, 11 S. & R. 422; Doe v. McLoskey, 1 Ala. 708; Perkins v. Winter, 7 Ala. 855; Matheson v. Hearin, 29 Ala. 210; Duval's heirs v. P. and M. Bank, 10 Ala. 636; Field's heirs v. Goldsby, 28 Ala. 224; Satcher v. Satcher's Adm'r, 41 Ala. 39; Rogers v. Wilson, 13 Ark. 507; Sheldon v. Newton, 3 Oh. St. 494; George v. Watson, 19 Tex. 354; Mohr v. Manniere, 3 C. L. N. 270; Ewing v. Higby, 7 Oh. Pt. 1, p. 198; Robb v. Irwin, 15 Oh. 689; Snevely v. Lowe, 18 Oh. 368; Benson v. Cilley, 8 Oh. St. 614—overruling Adams v. Jeffries, 12 Oh. 272.

⁸⁷ Halleck v. Moss, 17 Cal. 339; Coy v. Downie, 14 Fla. 544; Clark v.

real estate left by the intestate. His authority to sell, if it exists, was conferred by the orders of the surrogate and the other proceedings before him. The latter derives his power from the statutes, and in order to confer the authority upon the administrator to transfer the title to the land, and thus disinherit the heirs of the intestate, it is requisite that the directions of the statute, so far as they relate to the acquiring of jurisdiction of the subject-matter, and of the parties to be affected by the proceedings, should be strictly complied with. These principles are elementary, and no citation of authority to sustain them is necessary.⁸⁸

SEC. 17. *The Service of Notice on a Minor can not be Waived nor Dispensed with.*—It can not be waived by the minor because he is incompetent to act for himself.⁸⁹ Neither can it be waived by a guardian, unless the statute in direct terms invests him with that power.⁹⁰ Nor can the court by any means exonerate itself from complying with the statute. It can not, without service of the notice on the minor, appoint any guardian *ad litem* for him. The appointment of such guardian and his subsequent appearance in the cause as the representative of the minor can not cure any jurisdictional defect, nor tend to the validation of a proceeding otherwise void.⁹¹ Service of notice on the guardian of a minor does not, in the absence of a statute to that effect, dispense with the necessity for serving the

Thompson, 47 Ill. 25; Doe v. Bowen, 8 Ind. 197; Gerrard v. Thompson, 12 Ind. 636; Babbitt v. Doe, 4 Ind. 355; Good v. Norley, 28 Iowa, 188; Washburn v. Carmichael, 32 Iowa, 475; Valle v. Fleming, 19 Mo. 454; Campbell v. Brown, 6 How. Miss. 106; Winston v. McLendon, 43 Miss. 254; Puckett v. McDonald, 6 How. Miss. 269; Vick v. Mayor, 1 How. Miss. 379; Hamilton v. Lockhart, 41 Miss. 460; French v. Hoyt, 6 N. H. 370; Corwin v. Merritt, 3 Barb. 341; Schneider v. McFarland, 2 N. Y. 459; Dakin v. Hudson, 6 Cow. 222; Fiske v. Kellogg, 3 Oregon, 503; Taylor v. Walker, 1 Heisk. 734; Gibbs v. Shaw, 17 Wis. 197; Blodgett v. Hitt, 29 Wis. 169.

⁸⁸ Sibley v. Waffle, 16 N. Y. 185.

⁸⁹ Winston v. McLendon, 43 Miss. 254.

⁹⁰ Doe v. Anderson, 5 Ind. 33.

⁹¹ Chambers v. Jones, 72 Ill. 275; Moore v. Starks, 1 Oh. St. 369; Good v. Norley, 28 Iowa, 188; Clark v. Thompson, 47 Ill. 25.

minor himself.⁹² In New York, a guardian must be appointed for minor heirs on filing the petition; and notice must thereafter be given to heirs. The giving of the notice in advance of the appointment of the guardian is invalid.⁹³ If the person applying for the license to sell is also the guardian of the minors, his position as petitioner is incompatible with his duty as guardian. He can not, therefore, represent the heir, and the latter must have another representative appointed for the occasion.⁹⁴ In Illinois, proceedings by a guardian for the sale of the lands of his ward are purely *in rem*.⁹⁵ In Florida, no service of process on an infant heir is required. The court must appoint a guardian *ad litem*. But if no guardian *ad litem* is appointed, and the general guardian is served with process and appears and represents the minor, the proceedings are not void.⁹⁶ In Mississippi, if the guardian of a minor petitions for the sale of the lands of his ward, no notice need be given the latter. A summons must issue to the co-heirs, and also to three of the nearest relatives of the minor living in the state. The omission to summon these relatives is fatal to the subsequent proceedings.⁹⁷

SEC. 18. *The Notice must be Given in the Manner Prescribed by Statute, or it is Inoperative.*⁹⁸—If it attempts a description of the land sought to be sold, the description must be correct. A license to sell one tract of land founded on a notice, designating a different tract, is void.⁹⁹ If a

⁹² Clark v. Thompson, 47 Ill. 25.

⁹³ Ackley v. Dygert, 33 Barb. 176; Havens v. Sherman, 42 Barb. 636; Schneider v. McFarland, 2 N. Y. 459.

⁹⁴ Havens v. Sherman, 42 Barb. 636; Schneider v. McFarland, 2 N. Y. 459; Townsend v. Tallant, 33 Cal. 52; Kennedy v. Gaines, 51 Miss. 625.

⁹⁵ Mulford v. Beveridge, 78 Ill. 455.

⁹⁶ Price v. Winter, 15 Fla. 66.

⁹⁷ Stampley v. King, 51 Miss. 728.

⁹⁸ Herdman v. Short, 18 Ill. 59; Gibson v. Roll, 27 Ill. 190; Morris v. Hogle, 37 Ill. 150; Schnell v. Chicago, 38 Ill. 383; Bree v. Bree, 51 Ill. 367.

⁹⁹ Frazier v. Steenrod, 7 Iowa, 339; *contra* Maurr v. Parrish, 26 Oh. S. 636.

statute direct notice to be given by personal service, unless publication thereof is ordered by the court, a publication is, in the absence of such order, inoperative.¹⁰⁰ If a copy of the petition and account are required to be served, the service of a summons, in their stead is unauthorized and therefore void.¹⁰¹ If a publication is directed to be made in a specified newspaper for four weeks, it can not be made in that paper for three weeks, and in another paper the remaining week.¹⁰²

SEC. 19. *The Notice must be Given for the Time Prescribed.*—The publication of a notice for a shorter time than that sanctioned by law is void, and can impart no validity to a sale or other subsequent proceeding resting upon it.¹⁰³ This is true, although the time is shortened by an order of court in a case where the statute does not give the court that power.¹⁰⁴ If a statute requires the notice to be published for three successive weeks, the first publication to be six weeks before the presentation of the petition, and the notice as published designates a day for the presentation, less than six weeks from the date of the first publication, the notice is void, and can not be made valid by presenting the petition at a later day than that specified in the notice.¹⁰⁵ No notice need be given to persons in adverse possession, unless the statute directs it.¹⁰⁶ Giving notice to a person acting in one capacity seems not to affect him when claiming in another capacity. Hence, a consent given by a woman as guardian of minors was held not to prejudice her claim as widow of the decedent.¹⁰⁷

¹⁰⁰ Halleck v. Moss, 17 Cal. 339;

¹⁰¹ Johnson v. Johnson, 30 Ill. 223.

¹⁰² Townsend v. Tallant, 33 Cal. 45.

¹⁰³ Townsend v. Tallant, 33 Cal. 45; Corwin v. Merritt, 3 Barb. 341; Monahan v. Vandyke, 27 Ill. 155; Havens v. Sherman, 42 Barb. 636; *contra*, by statute, Woods v. Monroe, 17 Mich. 245.

¹⁰⁴ Havens v. Sherman, 42 Barb. 636.

¹⁰⁵ Gibson v. Roll, 30 Ill. 178.

¹⁰⁶ Yeomans v. Brown, 8 Met. 51.

¹⁰⁷ Helms v. Love, 41 Ind. 210.

SEC. 20. *The Order of Sale and its Effect as an Adjudication.*—If, upon hearing of the petition, the court is satisfied that a proper case exists, it will enter an order or license for the sale of the land. If the court had jurisdiction, this order, until vacated or reversed, is binding upon all parties in interest. The purchaser under it is in no danger of losing his title by proof being made that the order was erroneously given. It can not be collaterally attacked for error, fraud or irregularity, if the court had jurisdiction.¹⁰⁸ The form of the order is different in the different states. In California, it “must describe the lands to be sold and the terms of the sale.”¹⁰⁹ In Massachusetts, it need not designate which part of the testator’s lands are to be sold.¹¹⁰ In Texas, an order to sell all the lands of a decedent was thought to be proper,¹¹¹ while a license for the sale of so much as would raise \$1,500 (it appearing that the decedent held 34,000 acres) was regarded as of very questionable validity.¹¹² In Alabama, a license to sell must designate the place of sale.¹¹³

¹⁰⁸ Freeman on Judg’ts, sec. 319a; Stow v. Kimball, 28 Ill. 93; Beckett v. Selover, 7 Cal. 215; Farrington v. King, 1 Bradf. 182; Spragins v. Taylor, 48 Ala. 520; Jackson v. Robinson, 4 Wend. 437; Boyd v. Blankman, 29 Cal. 19; Myer v. McDougal, 47 Ill. 278; Carter v. Waugh, 42 Ala. 452; Morrow v. Weed, 4 Iowa, 77; Atkins v. Kinnan, 20 Wend. 241; Mulford v. Stalzenback, 46 Ill. 303; Savage v. Benham, 17 Ala. 119; Sprigg’s Estate, 20 Cal. 121; Giddings v. Steele, 28 Tex. 750; Gurney’s Succession, 14 La. An. 622; Hatcher v. Clifton, 33 Ala. 301; Walker v. Morris, 14 Ga. 323; Barbee v. Perkins, 23 La. An. 331; Gordon v. Gordon, 55 N. H. 399.

¹⁰⁹ C. C. P. of Cal., sec. 1554.

¹¹⁰ Yeomans v. Brown, 8 Met. 51; Norton v. Norton, 5 Cush. 524.

¹¹¹ Wells v. Polk, 36 Tex. 120.

¹¹² Graham v. Hawkins, 38 Tex. 628.

¹¹³ Brown v. Brown, 41 Ala. 215.

CHAPTER III.

SALES VOID BECAUSE OF ERRORS OR OMISSIONS SUBSEQUENT TO
THE JUDGMENT OR ORDER OF SALE.

SECTION 21. General Rule regarding the Effect of Irregularities.

SEC. 22. Failure to give Additional Bond, or to take Oath concerning the Sale.

SEC. 23. The Necessity of a Valid Execution, or Order of Sale.

SEC. 24. The Times when an Execution may not issue.

SEC. 25. Writs of Execution must be Sufficient in Form.

SEC. 26. Sales in the Absence of Levies.

SEC. 27. Sales without Inquisition or Appraisement.

SEC. 28. Sales without Notice.

SEC. 29. Sales, by Whom may be Made.

SEC. 30. Sales made at an Improper Time.

SEC. 31. Sales made at an Improper Place.

SEC. 32. Sales not at Public Auction.

SEC. 33. Sales to Person Disqualified from Purchasing.

SEC. 34. Sales to Raise more Money than was Authorized.

SEC. 35. Sales of Property not Liable to Sale.

SEC. 36. Sales of Property in Adverse Possession.

SEC. 37. Sales *en masse*.

SEC. 38. Sales Infected by Fraudulent Combinations and Devices.

SEC. 39. Purchaser's Title not Affected by Secret Frauds.

SEC. 21. *General Rule Regarding Irregularities.*—When a judgment or order of sale has been pronounced, it must next be enforced. The authority which pronounces it is judicial. That which enforces it is chiefly ministerial. In the exercise of this ministerial authority, various errors of commission or of omission are likely to occur. We shall devote this chapter to a brief and necessarily imperfect enumeration of those ministerial errors on account of which a judicial, execution or probate sale may be adjudged void. With respect to judicial and execution sales, “the general principle to be deduced from the authorities is,

that the title of a purchaser, not himself in fault, can not be impaired at law nor in equity by showing any mere error or irregularity in the proceedings. Errors and irregularities must be corrected by a direct proceeding. If not so corrected, they can not be made available by way of collateral attack on the purchaser's title."¹¹⁴ Probate sales, we are sorry to say, are generally viewed with extreme suspicion. Though absolutely essential to the administration of justice, and forming a portion of almost every chain of title, they are too often subjected to tests far more trying than those applied to other judicial sales. Mere irregularities of proceeding have, even after the proceedings had been formally approved by the court, often resulted in the overthrow of the purchaser's title. In fact, in some courts, the spirit manifested toward probate sales has been scarcely less hostile than that which has made tax sales the most precarious of all of the methods of acquiring title. In other courts, however, probate sales are treated as indulgently as other judicial sales.¹¹⁵ It is sometimes said that a sale made under a decree must pursue the directions therein contained; that a departure from these directions renders the sale void.¹¹⁶ But to invoke this rule the departure must be of a very material character; and must, we think, be a departure which has not been approved by a decree of confirmation entered in the court which ordered and had supervision of the sale.¹¹⁷

SEC. 22. *Failure to give Additional Bond, or to take Oath concerning the Sale.*—The granting of a license to sell real estate imposes a duty and also a pecuniary responsibility on the guardian or administrator in addition to the duty and responsibility otherwise attached to his office.

¹¹⁴ Freeman on Executions, sec. 339; Freeman on Cotenancy and Partition, sec. 548; Winchester v. Winchester, 1 Head, 460; Whitman v. Taylor, 60 Mo. 127; Hedges v. Mace, 72 Ill. 472; Cooley v. Wilson, 42 Ia. 428.

¹¹⁵ Harris v. Lester, 80 Ill. 307.

¹¹⁶ Williamson v. Berry, 8 How. U. S. 544; Jarboe v. Colvin, 4 Bush, 70; Cofer v. Miller, 7 Bush, 545.

¹¹⁷ Welch v. Louis, 31 Ill. 446; McGavock v. Bell, 3 Cald. 512.

This duty is to use his best efforts to make an advantageous sale of the property. This responsibility is to properly account for and pay over the proceeds of the sale. To insure a greater fidelity in performing this duty, some statutes have prescribed an oath to be taken before entering upon any of the proceedings necessary to precede the sale. To provide against any misappropriation of the proceeds of the sale, the statutes very generally exact an additional bond from the guardian, executor or administrator. The fact that a sale was made, or that the time or place thereof was selected in advance of the taking of this oath, has, in every case coming within our observation, been decided to be fatal to the purchaser's title.¹¹⁸ The same conclusion has been reached in several cases where sales were made without the giving of the additional bond.¹¹⁹ In most of the cases where sales were held void for the failure to take the oath or to give the bond, they had been confirmed by the court. In Indiana and Pennsylvania the failure to file the additional bond is an irregularity merely. After the confirmation and the payment of the money, this failure can not avoid the sale.¹²⁰ In New York, the filing of the original bond on the granting of letters of administration, is not a jurisdictional matter.¹²¹ The issue of letters without it is valid. The failure of a master in chancery to file his bond, can not be raised in a collateral suit to avoid a sale made by him and confirmed by the court.¹²²

¹¹⁸ *Campbell v. Knights*, 26 Me. 224; *Wilkinson v. Filby*, 24 Wis. 441; *Parker v. Nichols*, 7 Pick. 111; *Blackman v. Bauman*, 22 Wis. 611; *Williams v. Reed*, 5 Pick. 480; *Cooper v. Sunderland*, 3 Iowa, 114; *Thorn-ton v. Mulquinne*, 12 Iowa, 549.

¹¹⁹ *Wiley v. White*, 3 Stew. & P. 355; *Currie v. Stewart*, 26 Miss. 646; *Babcock v. Cobb*, 11 Minn. 347; *Rucker v. Dyer*, 44 Miss. 591; *Perkins v. Fairfield*, 11 Mass. 226; *Cohea v. State*, 34 Miss. 179; *Hamilton v. Lockhart*, 41 Miss. 460; *Washington v. McCaughan*, 34 Miss. 304. For application of a similar rule in partition suits, see *Freeman on Cotency and Partition*, sec. 466.

¹²⁰ *Foster v. Birch*, 14 Ind. 445; *Lockhart v. John*, 7 Pa. St. 137.

¹²¹ *Bloom v. Burdick*, 1 Hill, 130.

¹²² *Nicholl v. Nicholl*, 8 Pal. 349.

SEC. 23. *The Necessity for a Valid Execution.*—Though a judgment at law be entered, no officer has any authority to enforce it without a writ of execution. A sale, when no such writ had issued would, unquestionably, be void. In chancery, the decree of sale may of itself constitute a sufficient authority for its own execution.¹²³ The usual custom in chancery is to deliver a certified copy of the decree to the person charged by the court or by law with the duty of making the sale. Under the practice for the foreclosure of mortgages in California, the sheriff is authorized to proceed on receiving an execution or a certified copy of the decree. If he acts in the absence of both, his acts are void.¹²⁴ Some of the statutes require copies of orders of sale in probate to be delivered to the administrator or guardian as his authority to sell, and others contain no direct provision on the subject. We have never known of a sale being questioned on the ground that no copy of the license to sell had been delivered to the administrator. An execution is invalid and can not support a sale, unless it is issued out of a court,¹²⁵ and by an officer¹²⁶ competent to issue it. It must also be on a judgment capable of enforcement by execution. The judgment must not be void nor satisfied.¹²⁷ The defendant in execution must also be a person or corporation against which an execution may issue.¹²⁸ The execution must not be forged, either wholly nor in any material part.¹²⁹

SEC. 24. *The Times when an Execution may not Issue.*—By some statutes a plaintiff's right to execution does not exist immediately after the entry of the judgment, but remains in abeyance a specified period of time. The issue of execution before the expiration of this time is, in most

¹²³ *Karnes v. Harper*, 48 Ill. 527.

¹²⁴ *Heyman v. Babcock*, 30 Cal. 367.

¹²⁵ *Freeman on Executions*, sec. 15.

¹²⁶ *Ib.*, sec. 23.

¹²⁷ *Ib.*, secs. 19, 20.

¹²⁸ *Ib.*, sec. 22.

¹²⁹ *Ib.*, secs. 23, 47.

States, a mere irregularity, not of sufficient gravity to render the sale void.¹³⁰ The same rule is usually applied to writs issued contrary to agreement or pending a stay of execution. They will be vacated on motion. But if the defendant takes no steps to obtain their vacation, or to set aside sales made thereunder, the latter will be treated as valid.¹³¹ This remark is equally true of writs issued and sales made in disobedience of injunctions.¹³² At common law, execution could not regularly issue after a year and a day subsequent to the entry of judgment, without a revivor by *scire facias*. A writ issued in violation of this rule is not void.¹³³ So, at common law, an execution could not regularly issue without revivor of the judgment by *scire facias*, after the death of a sole plaintiff or of a sole defendant. The issue of a writ in violation of this rule is a more serious matter than its issue on a dormant judgment. If an execution is issued and tested after the death of a sole plaintiff, the authorities are very evenly divided upon the question whether it is void or irregular only.¹³⁴ But if it issues and bears *teste* after the death of a sole defendant, the authorities almost, but not quite unanimously, adjudge it void.¹³⁵ But the death of one of several plaintiffs or defendants neither suspends nor destroys the right to issue execution.¹³⁶

SEC. 25. *Writs of Execution must be Sufficient in Form.*—The necessity for a writ of execution can not be answered by a writ, called by that name, but substantially defective in form. It must at least purport to proceed from some competent authority; must show what judgment it is

¹³⁰ Freeman on Executions, sec. 25. But in Massachusetts a premature writ is void. *Penniman v. Cole*, 8 Met. 496.

¹³¹ Freeman on Executions, secs. 33, 26.

¹³² *Rikeman v. Kohn*, 48 Ga. 183; *Bagley v. Ward*, 37 Cal. 121.

¹³³ Freeman on Executions, secs. 29, 30.

¹³⁴ Freeman on Executions, sec. 35.

¹³⁵ *Ib.*, sec. 35.

¹³⁶ *Ib.*, sec. 36. With respect to the effect of the death of a party after the issue of execution, see *ib.*, sec. 37.

designed to enforce, and must direct the officer to execute or satisfy the judgment.¹³⁷ But there are various formal matters usually embodied in writs of execution, and in respect of which an error or omission is not necessarily fatal. Thus, a mistake or omission in designating the return day,¹³⁸ or in the attesting clause,¹³⁹ are not of sufficient consequence to defeat an execution sale. In some courts an execution, without a seal (where one is required) is void; in others it is irregular merely.¹⁴⁰ The most frequent mistakes in the issue of writs are made in attempting to describe judgments. The name of the plaintiff or of the defendant may be incorrectly stated; or the amount of the judgment may vary from the sum for which execution issues. These mistakes and variances are amendable. If no amendment is made, and no objection to the form of the writ is interposed by a motion to quash or vacate it, it must be treated as valid, unless the variance is so great that it appears not to be issued upon the judgment which is produced in its support.¹⁴¹

SEC. 26. *Sales in the Absence of Levies.*—When a judicial sale is made by virtue of an order or license of sale, no levy is necessary. The same rule holds good with respect to execution sales of real estate, where the judgment itself is a lien on the real property of the defendant. Personal property must be levied upon, or in some way subjected to the control of the officer, before a valid sale can be made under execution. As between the parties, the defendant can waive a levy. With respect to real estate, upon which a levy has neither been made nor waived, the authorities are very evenly divided as to the validity of an execution sale, some claiming that it is irregular merely, others that it is void.¹⁴²

¹³⁷ Freeman on Executions, secs. 39–41.

¹³⁸ *Ib.*, sec. 44.

¹³⁹ *Ib.*, sec. 45.

¹⁴⁰ *Ib.*, sec. 46.

¹⁴¹ *Ib.*, secs. 42 and 43.

¹⁴² Freeman on Executions, sec. 274.

SEC. 27. *Sales without Inquisition or Appraisalment.*—Some statutes require an inquisition or appraisalment of real estate to precede its sale under execution. Sales made in violation of this statutory provision are usually, but not universally held void.¹⁴³ In Missouri and Louisiana, a similar provision applies to probate sales; and a sale without an appraisalment is thought to be void.¹⁴⁴

SEC. 28. *Sales Void for Want of Notice of Sale.*—Some notice of the time and place of sale, and of the property to be sold, is obviously essential to the realization of its value. This notice is commonly required to be given by the statutes regulating judicial, execution and probate sales. Whether a compliance with this requirement is a pre-requisite to the power to sell, is uncertain. Undoubtedly a sale, without first giving the proper notice, would not be confirmed if the defect were known to the court. It would be vacated on motion, while the court has power to annul it by that kind of a proceeding.¹⁴⁵ Concerning execution sales “a very decided preponderance of the authorities maintains this proposition: That the statutes requiring notice of the sale to be given are directory merely, and that the failure to give such notice can not avoid the sale against any purchaser not himself in fault.”¹⁴⁶ With respect to executors', administrators' and guardians' sales the authorities are more evenly divided. We think, however, that they slightly preponderate toward the view that the giving of notice for the time, and substantially in the manner directed by statute, is indispensable to a valid sale.¹⁴⁷ The minority, on the other

¹⁴³ Freeman on Executions, secs. 284, 285.

¹⁴⁴ Strouse v. Drennan, 41 Mo. 289; Curley's Succession, 18 La. An. 728.

¹⁴⁵ Glenn v. Wootten, 3 Md. Ch. 514; Reynolds v. Wilson, 15 Ill. 394.

¹⁴⁶ Freeman on Executions, sec. 286; *Contra*, Hughes v. Watt, 26 Ark. 228; Lafferty v. Conn, 3 Sneed, 221. See Steward v. Pettigrew, 28 Ark. 372.

¹⁴⁷ Thomas v. Le Baron, 8 Met. 363; Curley's Succession, 18 La. An. 728; Blodgett v. Hitt, 29 Wis. 169; Mountour v. Purdy, 11 Minn. 384; Gernon v. Bestick, 15 La. An. 697.

hand, insist that the existence of the notice and its sufficiency are legitimate subjects of inquiry when the sale is reported for confirmation ; but not afterwards.¹⁴⁸

SEC. 29. *By whom the Sale may be Made.*—When a sale is to be made under a decree in chancery, the court may appoint some one as its agent or commissioner and invest him with power to make the sale.¹⁴⁹ A sale under execution must be made by a sheriff or constable, unless he is disqualified to act. So, an administrator's sale must be made by or under the direction of the administrator. The court can not appoint some other person to make the sale.¹⁵⁰ Nor can an executor appoint some person in his stead to exercise a power of sale contained in the will.¹⁵¹ An administrator's or commissioner's sale, at which he was not present, and conducted by his agent, is voidable, if not void.¹⁵²

SEC. 30. *At what Time a Sale may be Made.*—Of course no judicial or execution sale ought to take place at any other time than that fixed by the notice of sale ; and the notice of sale ought not to fix upon any time prohibited by law. A sale made in violation of this rule will, no doubt, be vacated or refused confirmation if the irregularity is suggested to the court at the proper time. It is not, however, void in most states.¹⁵³ In Texas, a sale made at a time different from that allowed by law can not be collaterally attacked after its confirmation.¹⁵⁴ But if the irregularity be not thus cured by confirmation, the sale is void.¹⁵⁵

¹⁴⁸ *Morrow v. Weed*, 4 Iowa, 77 ; *Little v. Sinnett*, 7 Iowa, 324 ; *Minor v. Selectmen*, 4 S. & M. 602 ; *Bland v. Muncaster*, 24 Miss. 62 ; *Hanks v. Neal*, 44 Miss. 212 ; *McNair v. Hunt*, 5 Mo. 301 ; *Cooley v. Willson*, 42 Ia. 428 ; *Hudgens v. Jackson*, 51 Ala. 514.

¹⁴⁹ *Freeman on Executions*, sec. 291.

¹⁵⁰ *Crouch v. Eveleth*, 12 Mass. 503 ; *Swan v. Wheeler*, 4 Day, 137 ; *Jarvis v. Russick*, 12 Mo. 63 ; *Rose v. Newman*, 26 Tex. 131.

¹⁵¹ *Pearson v. Jamison*, 1 McLean, 197.

¹⁵² *Chambers v. Jones*, 72 Ill. 275 ; *Sebastian v. Johnson*, 72 Ill. 282.

¹⁵³ *Freeman on Executions*, sec. 287.

¹⁵⁴ *Brown v. Christie*, 27 Tex. 75.

¹⁵⁵ *Peters v. Caton*, 6 Tex. 556 ; *Tippett v. Mize*, 30 Tex. 365.

It is always essential that a sale be made under a valid, subsisting authority. A sale made when such authority had been destroyed by lapse of time would everywhere be treated as void. If the statute under which a license to sell is granted limits the operation of the license within a designated period, a sale outside of the prescribed limit is a nullity.¹⁵⁶ In some instances licenses to sell have been held to have lost their vitality through lapse of time, although the statute had not directly prescribed any such limit to their power.¹⁵⁷ If the act under which an order of sale has been granted is repealed, or the court in which it was entered is abolished, its legal vitality is destroyed and can not support a subsequent sale.¹⁵⁸

SEC. 31. *Sales made at an Improper Place* are sometimes held to be irregular merely, but more frequently are adjudged void.¹⁵⁹ Execution sales of real estate must be made in the county where it is situate, and by an officer of such county;¹⁶⁰ but a commissioner in chancery may be authorized to sell real estate beyond the limits of the county in which he was appointed.¹⁶¹ Personal property capable of being examined and inspected must, if possible, be at or near the place of sale. Bidders must be permitted to view it, and, by the exercise of their various senses, to judge of its character and value. Any other rule would tend to a wanton sacrifice of the property. Hence, a sale of personal property, at a place where it can not be examined or seen, is a nullity.¹⁶²

¹⁵⁶ *Macy v. Raymond*, 9 Pick. 285; *Marr v. Boothby*, 19 Me. 150; *Mason v. Ham*, 36 Me. 573; *Williamson v. Williamson*, 52 Miss. 725.

¹⁵⁷ *Wellman v. Lawrence*, 15 Mass. 326. In this case the sale was made fifteen years subsequent to the license.

¹⁵⁸ *McLaughlin v. Janney*, 6 Gratt. 609; *Perry v. Clarkson*, 16 Oh. 571; *Bank v. Dudley*, 2 Pet. 493.

¹⁵⁹ *Freeman on Executions*, sec. 289.

¹⁶⁰ *Ib.*, sec. 289.

¹⁶¹ *Bank v. Trapier*, 2 Hill Ch. 25.

¹⁶² *Freeman on Executions*, sec. 290; *Collins v. Montgomery*, 2 N. & McC. 392; *contra*, where valid levy has been made, *Eads v. Stephens*, 63 Mo. 90.

SEC. 32. *Sales not at Public Auction.*—Execution sales must be made at public auction. Probate and other judicial sales are generally controlled, in this respect, by the directions contained in the license or decree. Whenever by law, or by the direction in an order of sale, property is required to be sold at public auction, a private sale thereof is invalid.¹⁶³

SEC. 33. *Sales to Persons Disqualified from Purchasing.*—The policy of the law is not to permit the same person to represent conflicting interests. Hence, trustees, sheriffs, constables, administrators, executors, guardians, and all persons vested with authority to sell the property of others are themselves forbidden from becoming interested in the sale. A sale made in violation of this rule will always be vacated upon a motion made in due time.¹⁶⁴ But the only question strictly within the scope of our present inquiry is the effect of such a sale when no action is taken for the purpose of setting it aside. If the sale and conveyance be made directly to the administrator, sheriff, or other officer, it may well be declared a nullity, on the ground that one person can not unite in himself the capacity of vendor and vendee—can not, by the same act, transmit and receive.¹⁶⁵ But usually laws are sought to be evaded rather than openly violated. Hence, an administrator or sheriff desirous of becoming the owner of property about to be sold by himself, will seek the aid of a friend, in whose name the purchase can be made and the title held, for such time as will conceal the true nature of the transaction. In a case of this kind the officer can not be permitted to profit by the transaction at the expense and against the will of the

¹⁶³ *Hutchinson v. Cassidy*, 46 Mo. 431; *Ellet v. Paxson*, 2 W. & S. 418; *Fambro v. Gantt*, 12 Ala. 298; *Wier v. Davis*, 4 Ala. 442; *McArthur v. Carrie*, 32 Ala. 75; *Gaines v. De La Croix*, 6 Wall. 719; *Neal v. Patterson*, 40 Ga. 363; *Ashurst v. Ashurst*, 13 Ala. 781; *Worten v. Howard*, 2 S. & M. 527; *contra*, *Wynns v. Alexander*, 2 D. & B. Eq. 58; *Tynell v. Morris*, 1 D. & B. Eq. 559.

¹⁶⁴ *Freeman on Executions*, sec. 292.

¹⁶⁵ *Hamblin v. Warnecke*, 31 Tex. 94; *Boyd v. Blankman*, 29 Cal. 34; *Stapp v. Toler*, 3 Bibb, 450; *Dwight v. Blackmar*, 2 Mich. 330.

parties interested. On learning the true state of the facts, they may have the sale annulled; or they may affirm it and permit it to stand. If they seek to annul it, they are entitled to succeed, irrespective of the fairness or unfairness of the sale, or the motives which prompted the administrator or other officer or trustee.¹⁶⁶ But the sale is not void in the extreme sense. It can not be attacked and overthrown by third persons. Neither can the heirs or other parties in interest treat it as unqualifiedly void. They may confirm it either directly or by their non-action continued for a long period of time after having notice of the true nature of the transaction. Such, at least, is the opinion of the majority of the authorities.¹⁶⁷ In some of the cases, however, such a sale appears to have been held void.¹⁶⁸ In New York it is made void by statute.¹⁶⁹ Sales made by sheriffs and constables, and in which they are interested, are, under the statutes in force in many of the States, held void.¹⁷⁰

SEC. 34. *Sales to Raise too Great a Sum.*—In Kentucky, an execution or chancery sale to raise a sum greater than that authorized by the judgment or decree, is void. A like rule seems to apply to probate sales in Massachusetts.¹⁷¹ In the last named state, a sale for \$953.30, under a license authorizing the sale of so much lands as would pay \$640, was held to be a nullity.¹⁷²

¹⁶⁶ Riddle v. Roll, 24 Oh. St. 572; Anderson v. Green, 46 Geo. 361; Potter v. Smith, 36 Ind. 231; Smith v. Drake, 23 N. J. Eq. 302; Froneberger v. Lewis, 70 N. C. 456; Ryden v. Jones, 1 Hawks, 497; Miles v. Wheeler, 43 Ill. 123; Ives v. Ashley, 97 Mass. 198; Bailey v. Robinson, 1 Gratt. 4; Edmonds v. Crenshaw, 1 McCord's Ch. 252; Glass v. Greathouse, 20 Oh. 503; Guerrero v. Ballerino, 48 Cal. 118,

¹⁶⁷ Litchfield v. Cudworth, 15 Pick. 23; Munn v. Burges, 70 Ill. 604; Boyd v. Blankman, 29 Cal. 19; Hicks v. Weems, 14 La. An. 629; Muselman v. Eshelman, 10 Pa. S. 394. See also the authorities in the preceding citation.

¹⁶⁸ Hamblin v. Warnecke, 31 Tex. 94.

¹⁶⁹ Terwilliger v. Brown, 44 N. Y. 237.

¹⁷⁰ Freeman on Executions, sec. 292.

¹⁷¹ Patterson v. Carneal, 3 A. K. Marsh. 618; Blakey v. Abert, 1 Dana, 185; Hastings v. Johnson, 1 Nev. 613.

¹⁷² Litchfield v. Cudworth, 15 Pick. 23; Lockwood v. Sturtevant, 6 Conn. 373.

SEC. 35. *Sales of Property not Subject to Sale.*—It is always indispensable that the property sold should be subject to the license, decree or writ under which the sale is made. If an execution issues, it can reach the property of the defendant only. If the property of a stranger is seized and sold, his title is not divested thereby.¹⁷³ If property of the defendant is sold, it must be subject to the execution levied upon it, or the proceeding will be entirely inoperative upon his title.¹⁷⁴ Hence, an execution sale of a homestead is usually void;¹⁷⁵ and the same rule is often applied to other exempt property.¹⁷⁶ If, under the statute of a state, the homestead of a decedent does not come within the control of its probate courts, an administrator's sale thereof, though ordered and confirmed by the court, is an idle proceeding.¹⁷⁷ If, while acting under a valid decree or license, an administrator sells lands not embraced therein, his act is, as to such lands, obviously without any legal support.¹⁷⁸

SEC. 36. *Sales of Property in Adverse Possession.*—The policy of the common law prohibited the transfers of causes of action. Lands of which the owner was disseized could not be conveyed during such disseizin. The conveyance of such lands was, by statute (32 Henry 8, c. 9), a crime for which, on conviction, both vendor and vendee were subject to the forfeiture of the value of the lands sought to be conveyed. Execution and judicial sales have never been within this inhibition against voluntary transfers. On the contrary, they are supported, whether he whose title is involuntarily transferred be seized or disseized.¹⁷⁹

SEC. 37. *Sales en Masse.*—The duty of an officer in

¹⁷³ Freeman on Executions, sec. 335.

¹⁷⁴ Freeman on Executions, sec. 109.

¹⁷⁵ *Ib.*, sec. 239.

¹⁷⁶ *Ib.*, sec. 215.

¹⁷⁷ *Yarboro v. Brewster*, 38 Tex. 397; *Hamblin v. Warnecke*, 31 Tex. 93; *Howe v. McGivern*, 25 Wis. 525.

¹⁷⁸ *Ludlow v. Park*, 4 Ohio, 5.

¹⁷⁹ *Drinkwater v. Drinkwater*, 4 Mass. 354; *Willard v. Nason*, 5 Mass. 241; *High v. Nelms*, 14 Ala. 350; *Cook v. Travis*, 20 N. Y. 400; *McGill v. Doe*, 9 Ind. 306; *Stevens v. Hauser*, 39 N. Y. 302.

making a sale is to offer the property in such parcels as will prove most inviting to the bidders, and realize the greatest sums, for the heirs and other interested persons. Hence, if several parcels of real estate be embraced in one license, the administrator is to offer them for sale, not in one lump, but "in such parcels as shall be best calculated to secure the greatest aggregate amount."¹⁸⁰ Where several distinct parcels of land are to be sold, each ought to be offered and sold separately, unless it is clear that the union of two or more will augment rather than decrease the aggregate proceeds of the sale. In Indiana, Michigan, Tennessee and Pennsylvania, a lumping execution sale of two or more separate parcels of land is void;¹⁸¹ but in nearly, if not quite all the other states, such a sale, though voidable, is not a nullity.¹⁸² In Michigan, a probate sale is not void because two or more parcels are sold together.¹⁸³

SEC. 38. *Sales infected by Fraudulent Combinations and Devices.*—Judicial and execution sales are usually imperative. Those who own the property are compelled to sell for whatever is offered. To avoid the sacrifice likely to ensue, notices of sale are required to be given, the property is struck off to the highest bidder, and competition among the persons intending to bid is sought to be produced. But the bidders, on their part, may enter into combinations and devices, either with one another or with the officer conducting the sale, by means of which competition is lessened or altogether avoided. Every scheme looking to this result is highly immoral, and will, if possible, be thwarted by the courts. The sale may be vacated, either by motion or by a bill in equity. "Whether a purchase obtained by the prevention of competition can, by the guilty party, be asserted at law, is a question upon which the courts are by no means agreed. In several of the states such a purchase, and the deed made

¹⁸⁰ Delaplaine v. Lawrence, 3 N. Y. 304.

¹⁸¹ Freeman on Executions, sec. 296.

¹⁸² *Ib.*, sec. 296; Bouldin v. Ewart, 63 Mo. 330.

¹⁸³ Osman v. Traphagen, 23 Mich. 80.

in pursuance thereof, are regarded as a valid transfer of the legal title. The defendant in execution, wishing to prevent the assertion of this title, must claim the assistance of a court of equity. But the majority of the decisions sustains an adverse theory—one under which the title of the fraudulent purchaser is, while in his hands, regarded as void, and therefore as capable of being resisted not less successfully at law than in equity."¹⁸⁴

SEC. 39. *Purchaser's Title not Affected by Secret Frauds.*

—It is a general rule that one who purchases at a judicial, probate or execution sale, can not be deprived of his title by secret frauds or irregularities, in which he did not participate and of which he had no notice.¹⁸⁵ Hence, an administrator's sale can not be avoided by showing that he procured his license to sell by fraud and misrepresentation, in the absence of any necessity, and with the design of sacrificing the interests entrusted to his care.¹⁸⁶ Nor can an innocent purchaser be injuriously affected by proof of any mistake, error or fraud of an administrator or guardian in conducting a sale.¹⁸⁷ Although the original purchaser has himself been guilty of fraudulent devices, or has had notice of such devices practiced by others, he can transmit a valid, unimpeachable title to a vendee for value, in good faith, and without notice. Therefore, if a sale be nominally made to a stranger, but really for the benefit of the administrator, and this stranger convey to another, for value, who has no notice that the apparent are not the true facts, the title can not, in the hands of the latter or his vendees, be rendered void or voidable by proof of the real facts.¹⁸⁸ The

¹⁸⁴ Freeman on Executions, sec. 297; Underwood v. McVeigh, 23 Gratt. 409.

¹⁸⁵ Freeman on Executions, secs. 342, 343.

¹⁸⁶ Lamothe v. Lippott, 40 Mo. 142; Myer v. McDougal, 47 Ill. 278; Moore v. Neil, 39 Ill. 256; McCown v. Foster, 33 Tex. 241.

¹⁸⁷ Gwinn v. Williams, 30 Ind. 374; Staples v. Staples, 24 Gratt. 225; Jones v. Clark, 25 Gratt. 642; Patterson v. Lemon, 50 Ga. 231.

¹⁸⁸ Blood v. Hayman, 13 Met. 231; Staples v. Staples, 24 Gratt. 225; Robbins v. Bates, 4 Cush. 104; Gwinn v. Williams, 30 Ind. 374.

purchaser at a guardian's or administrator's sale is not charged with the duty of seeing to the proper application of the proceeds of the sale. The validity of his title is not destroyed by the embezzlement of the money which he has paid to the person authorized by law to receive it.¹⁸⁹

CHAPTER IV.

THE CONFIRMATION AND DEED.

SECTION 40. Notice must be Given before Confirming Sales.

SEC. 41. Confirmation is Essential to Title.

SEC. 42. What Irregularities are Cured by Confirmation.

SEC. 43. Deed is Essential to Transfer of Legal Title.

SEC. 44. Deed, when and by Whom, may be Made.

SEC. 45. Deed when Void, because not in Proper Form.

SEC. 40. *Notice before Confirmation.*—Under the statutes in force in most of the states, execution sales are not required to be approved by the court out of which the writ issued. Chancery and probate sales, on the other hand, are usually made subject to the approval of the court. In order to obtain this approval, some of the statutes require a verified return of sales to be filed, and that this return shall be brought on for hearing only after notice has been given in a mode prescribed by statute. Where this is the case, the question arises whether a confirmation entered without giving any such notice is valid. The authorities on the subject are too meagre to justify any positive answer; but their tendency is toward the conclusion that the confirmation is a nullity, or, at least, that the confirmation does not preclude the parties from urging, in a collateral attack, any objections existing against the sale.¹⁹⁰

¹⁸⁹ Giles v. Pratt, 1 Hill S. C. 239; Mulford v. Stalzenback, 46 Ill. 303; Muskingum Bank v. Carpenter, 7 Oh., part 1, p. 21.

¹⁹⁰ Speck v. Wohlien, 22 Mo. 310; Perkins v. Gridley, 50 Cal. 97.

SEC. 41. *Confirmation is Essential to Title.*—When the law under which a sale is made requires it to be reported to court for approval or disapproval, such approval is essential to the consummation of the sale. Without it there is no authority for making any conveyance to the purchaser,¹⁹¹ and a conveyance without authority is obviously void.¹⁹² This rule is equally applicable to executions, chancery and probate sales.¹⁹³ But instances may occur in which the ratification or acquiescence of the parties may either estop them from invoking this rule, or give rise to the presumption that an order of confirmation was made, of which the evidence has been lost.¹⁹⁴ So, the approval of the court has sometimes been inferred from its subsequent acts and proceedings, though no order of confirmation could be found in its records.¹⁹⁵

SEC. 42. *What Irregularities are Cured by Confirmation.*—In Kansas, the confirmation by the court of an execution sale “is an adjudication merely that the proceedings of the officer, as they appear of record, are regular, and a direction to the sheriff to complete the sale.”¹⁹⁶ With respect to chancery and probate sales, we apprehend that their confirmation has an effect beyond that conceded in Kansas to the confirmation of execution sales. The object

¹⁹¹ *McBain v. McBain*, 15 Oh. St. 337; *Curtis v. Norton*, 1 Oh. 137.

¹⁹² *Williamson v. Berry*, 8 How. U. S. 496; *Gowan v. Jones*, 10 S. & M. 164; *Dickerson v. Talbot*, 14 B. Monr. 60.

¹⁹³ *Mason v. Osgood*, 64 N. C. 467; *Rawlins v. Bailey*, 15 Ill. 178; *Valle v. Fleming*, 19 Mo. 454; *Wallace v. Hall*, 19 Ala. 367; *Rea v. McEachron*, 13 Wend. 465; *Bonner v. Greenlee*, 6 Ala. 411; *Wade v. Carpenter*, 4 Ia. 361; *State v. Towl*, 48 Mo. 148.

¹⁹⁴ *Henderson v. Herrod*, 23 Miss. 434; *Tipton v. Powell*, 2 Coldw. 19; *Watts v. Scott*, 3 Watts, 79; *Gowan v. Jones*, 10 S. & M. 164; *Moore v. Greene*, 19 How. U. S. 69. In some cases the confirmation of probate sales is not required by statute. *Hobson v. Ewan*, 62 Ill. 146; *Robert v. Casey*, 25 Mo. 584. In Missouri, the sale of lands under an order of the probate court must be confirmed; but confirmation is not indispensable to sales in proceedings before the circuit court. *State v. Towl*, 48 Mo. 148; *Castleman v. Relfe*, 50 Mo. 583.

¹⁹⁵ *Grayson v. Weddle*, 63 Mo. 523.

¹⁹⁶ *Koehler v. Ball*, 2 Kans. 172.

of the proceeding for confirmation is to furnish an opportunity for inquiry respecting the acts which have been done under the license to sell. The court may, if it deems best, ratify various irregularities in the proceedings. If the officer changed the terms of the sale, the court may ratify his action, provided the terms, as changed, are such as the court had power to impose in the first instance.¹⁹⁷ As to the matters upon which a court is required to adjudicate in its order of confirmation, we see no reason why its decision should not be binding, and should not preclude the re-assertion of any matter which was either passed upon by the court, or which the parties might have had passed upon if they had chosen to bring it to the attention of the Court.¹⁹⁸ But the curative powers of orders of confirmation extend to voidable rather than to void sales. If a sale be void because the court did not have jurisdiction to order it, an order confirming it is necessarily inoperative. "The sale being void, there was no subject-matter upon which the order of confirmation could act. If the court had no jurisdiction to order the sale, it had none to confirm it. Where there is no power to render a judgment or to make an order, there can be none to confirm or execute it."¹⁹⁹ If, after property is sold at probate sale to the highest bidder, he fails to comply with his bid, and another person is substituted in his place and is reported to the court as the purchaser, and the sale is confirmed to the latter, he can not avoid the sale and be exonerated from paying the purchase price. "The mere substitution of one person for another can not affect the validity of the sale. The order directing the sale, and the order confirming it, give vitality the purchase."²⁰⁰

¹⁹⁷ *Jacob's Appeal*, 23 Pa. Stat. 477; *Emery v. Vroman*, 19 Wis. 689; *Thorn v. Ingram*, 25 Ark. 58.

¹⁹⁸ *Willis v. Nicholson*, 24 La. An. 545; *Cockey v. Cole* 28 Md. 276; *Hotchkiss v. Cutting*, 14 Minn. 537; *Brown v. Gilmor*, 8 Md 322; *Thorn v. Ingram*, 25 Ark. 58; *Osman v. Traphagen*, 23 Mich. 80; *Conover v. Musgrove*, 68 Ill. 58.

¹⁹⁹ *Townsend v. Tallant*, 33 Cal. 54; *Shriver v. Lynn*, 2 How. U. S. 57; *Hawkins v. Hawkins*, 28 Ind. 70. See *Bethel v. Bethel*, 6 Bush, 65.

²⁰⁰ *Halleck v. Guy*, 9 Cal. 197; *Ewing v. Higby*, 7 Oh., pt. p. 198.

SEC. 43. *Deed essential to the Transfer of Legal Title.*

—A conveyance is necessary to invest the purchaser, at an execution, chancery or probate sale, with the legal title.²⁰¹ In Maryland and Texas, this rule seems not to apply to execution sales,²⁰² though in the last named state, a conveyance by an administrator is conceded to be essential to the transfer of the legal title after a probate sale.²⁰³

SEC. 44. *Deed, when and by Whom to be Made.*—In Massachusetts and Maine, under statutes prescribing that licenses for sales should continue in force for one year only after they were given, it was held that the execution of a deed was a part of the sale, and that, if not executed within one year after the granting of the license, it was void.²⁰⁴ We can not concur in this opinion. A sale is certainly complete when it has been regularly confirmed by the court, and the purchase price has been paid to the person entitled to receive it. Even if this be not true, the purchaser has acquired an equitable title;—a right to a conveyance in pursuance of his purchase and payment. A court of equity would recognize and protect this right, by decreeing a conveyance.²⁰⁵ If a conveyance can be compelled, certainly it ought not to be void merely because made without compulsion.²⁰⁶ No conveyance ought to be made before the payment of the purchase-money.²⁰⁷ If made before such payment, it is void in Indiana.²⁰⁸ But, we apprehend that,

²⁰¹ Freeman on Executions, sec. 324; Merrit v. Terry, 13 Johns. 471; Doe v. Hardy, 52 Ala. 291; Hudgens v. Jackson, 51 Ala. 514; Van Alstyne v. Wimple, 5 Cow. 162; Farmers' Bank v. Merchant, 13 How. Pr. 10.

²⁰² Boring v. Lemmon, 5 H. & J. 223; Leland v. Wilson, 34 Tex. 91; Fleming v. Powell, 2 Tex. 225.

²⁰³ Sybert v. McCowen, 28 Tex. 638.

²⁰⁴ Macy v. Raymond, 9 Pick. 287; Wellman v. Lawrence, 15 Mass. 326; Mason v. Ham, 36 Me. 573.

²⁰⁵ Platt's Heirs v. McCullough, 1 McLean, 69.

²⁰⁶ Howard v. Moore, 2 Mich. 226; Osman v. Traphagen, 23 Mich. 80.

²⁰⁷ Barnes v. Morris, 4 Ired. Eq. 22.

²⁰⁸ Ruckle v. Barbour, 48 Ind. 274; Chapman v. Harwood, 8 Blackf. 82. In Alabama, an order to convey before all the purchase-money is paid, is a nullity. Corbitt v. Clenny, 52 Ala. 430.

as a general rule, such a conveyance is voidable rather than void.²⁰⁹ If the statute under which a sale is made, does not authorize a conveyance, until after the expiration of the time allowed the defendant to redeem his property, a deed made in advance of that time is a nullity.²¹⁰ After the right to a deed has become perfect, we believe it may be made at any time. An administrator's, executor's or guardian's deed must be made in person. These officers exercise powers in the nature of trusts wherein special confidence is reposed. Hence, they can not delegate their authority to agents.²¹¹ Sheriffs and constables, on the other hand, may have deputies, and such deputies are competent to execute conveyances in the names of their principals.²¹² In Mississippi, an administrator *de bonis non* can not execute a conveyance where the sale was made by his predecessor in office.²¹³ But we judge the better rule to be, that such an administrator may complete whatever the first administrator ought to have done.²¹⁴ A conveyance made to a person not entitled to receive it, as where a deed is given to one as assignee when no assignment has been made, is void.²¹⁵

SEC. 45. *Deed, when Void because not in Proper Form.*
—The instances in which a deed, issued in pursuance of an execution or chancery sale, is void for errors, defects or mistakes in form, are very rare. In fact, any instrument executed by an officer authorized to make it, purporting to convey the property, is probably sufficient, if the acts necessary to authorize him to make a conveyance can be shown.²¹⁶ Of course the deed must be executed with the formalities essential to other deeds, and must show that the person

²⁰⁹ *Osman v. Traphagen*, 23 Mich. 80.

²¹⁰ *Freeman on Executions*, sec. 316.

²¹¹ *Gridley v. Phillips*, 5 Kans. 349.

²¹² *Freeman on Executions*, sec. 327.

²¹³ *Davis v. Brandon*, 1 How. Miss. 154.

²¹⁴ *Gridley v. Phillips*, 5 Kans. 354.

²¹⁵ *Carpenter v. Sherfy*, 71 Ill. 427.

²¹⁶ *Freeman on Executions*, sec. 329.

who signs it is acting in an official capacity, and not merely conveying his own title to the property. In some States a form for sheriff's deeds is prescribed by statute. These statutes are generally, but not universally, declared to be directory merely.²¹⁷ Deeds executed by executors, administrators or guardians are, in many States, treated with less indulgence than those made by sheriffs. This is particularly the case where a statute has directed that some statement or recital shall be set forth in a deed. Such statutes, with reference to administrator's and guardian's deeds, have been held imperative, and not directory merely. Thus, where a statute required an order to be set forth at large, a deed merely referring to such order and stating its substance was adjudged void.²¹⁸ The correctness of this decision may be doubted; but it is certain that an omission to refer to an order, or a reference which did not fully describe the order, would, under a statute similar to the one just alluded to, render the deed void.²¹⁹ Although a statute requires the order of sale and also that of confirmation to be referred to or set out in the deed, a mere mistake in the reference is not fatal, if it appears from the deed, taken as a whole, that the reference, as made, is a mistake, and that it was intended to embrace the orders under which the sale and deed were in fact made.²²⁰ The same rule applies to mistakes in the recitals in deeds made in pursuance of execution sales.²²¹ Irrespective of any statutory directions on the subject, every administrator's, executor's or guardian's deed should refer to the authority or license under which it is made; should state that the person making it acted under such license; and should contain apt words to convey the estate of the ward or decedent, as contradistinguished from

²¹⁷ *Ib.*, sec. 329.

²¹⁸ *Smith v. Finch*, 1 Scam. 323.

²¹⁹ *Atkins v. Kinnan*, 20 Wend. 241.

²²⁰ *Sheldon v. Wright*, 5 N. Y. 497; *Thomas v. Le Baron*, 8 Met. 361; *Jones v. Taylor*, 7 Tex. 242; *Moore v. Wingate*, 53 Mo. 398; *Glover v. Ruffin*, 6 Oh. 255.

²²¹ *Freeman on Executions*, sec. 329.

the private estate of the person executing the deed;²²² but it need not recite all the steps taken in making the sale, as that the sale was at public auction, and that the grantee was the highest bidder.²²³

CHAPTER V.

THE LEGAL AND EQUITABLE RIGHTS OF PURCHASERS AT VOID SALES.

SECTION 46. Purchaser's Right to Resist the Payment of his Bid.

SEC. 47. Purchaser's Right to Recover Money Paid.

SEC. 48. Purchaser's Right to urge Acts of Ratification as Estoppels in his Favor.

SEC. 49. Purchaser's Right to Subrogation Denied.

SEC. 50. Purchaser's Right to Subrogation Affirmed, under Execution and Chancery Sales.

SEC. 51. Purchaser's Right to Subrogation Affirmed, under Probate Sales.

SEC. 52. Purchaser's Right to Subrogation, where he is Guilty of Fraud.

SEC. 53. Purchaser's Right to Aid of Equity in Supplying Omissions and Correcting Mistakes.

SEC. 46. *Purchaser's Right to Resist the Payment of his Bid.*—If the purchaser at a void execution or judicial sale be so fortunate as to discover the true character and effect of the sale, prior to the actual payment of the purchase price, he will, of course, seek to avoid making such payment. No doubt the bidder at a void sale is entitled to be released from his bid. “The purchaser at a partition sale is entitled to the whole title partitioned. If, from any irregularities or defects in the suit or in the proceedings, the purchaser would not, by completing his bid and receiving his conveyance, become invested with the whole title with

²²² Jones v. Taylor, 7 Tex. 242; Bobb v. Barnum, 59 Mo. 394; Griswold v. Bigelow, 6 Conn. 258; Lockwood v. Sturdevant, 6 Conn. 373. The two cases last named are limited in Watson v. Watson, 10 Conn. 77.

²²³ Kingsbury v. Wild, 3 N. H. 30.

which the court assumed to deal, then he will be released from his bid. Hence, if jurisdiction has not been acquired over one of the co-tenants, the purchaser will be released."²²⁴ So, in purchases under execution sales, the purchaser can not be compelled to make payment, if the proceedings are so defective, in any respect, that they can not divest the title of the judgment debtor.²²⁵ Every purchaser has a right to suppose that, by his purchase, he will obtain the title of the defendant in execution in case of execution sales, and of the ward or decedent in the case of a guardian's or administrator's sale. The promise to convey this title is the consideration upon which his bid is made. If the judgment or order of sale is void, or if, from any cause, the conveyance, when made, can not invest him with the title held by the parties to the suit or proceeding, then his bid, or other promise to pay, is without consideration and can not be enforced. He may successfully resist any action for the purchase-money, whether based upon the bid or upon some bond or note given by him.²²⁶ In Mississippi, however, he can not avoid paying the purchase-price of personal property of which he has obtained, and still retains possession by virtue of the sale.²²⁷ The distinction between void sales and defective titles must be kept in view, to avoid any misapprehension of the rights of one who has purchased at an execution or judicial sale, without in fact obtaining anything. If he obtains nothing because of a defect in the proceedings, he can defeat an action for the amount of his bid. If, on the other hand, the proceedings are perfect, but the defendant, or ward, or decedent, had no title to be sold nor conveyed, the purchaser is nevertheless

²²⁴ Freeman on Cotenancy and Partition, sec. 547.

²²⁵ Freeman on Executions, sec. 301.

²²⁶ Laughman v. Thompson, 6 S. & M. 259; Campbell v. Brown, 6 How. Miss. 230; Bartee v. Thompson, 4 Sneed, 623; Todd v. Dowd, 1 Met. (Ky.) 281; Barrett v. Churchill, 18 B. Monr. 387; Washington v. McCaughan, 34 Miss. 304; Riddle v. Hill, 51 Ala. 224.

²²⁷ Washington v. McCaughan, 34 Miss. 304; Martin v. Tarver, 43 Miss. 517; Jaggars v. Griffin, 43 Miss. 134.

bound by his bid. *Caveat emptor* is the rule of all execution and judicial sales. Each bid is made for such title as the defendant, ward or decedent may have, and is therefore binding, whether either had title or not.²²⁸

SEC. 47. *The Purchaser's Right to Recover back Money Paid.*—Whoever pays out money on account of a purchase made at a void sale, parts with a valuable consideration, for which he acquires nothing. The question then arising, is: Has the purchaser any remedy? and, if so, what is the remedy, and to what cases may it be applied with success? Where the plaintiff is the purchaser, he may, in most states, upon failure of his title, in effect vacate the apparent satisfaction produced by the sale, and obtain a new execution.²²⁹ If the title fails through defects in the proceedings arising from the neglect or misconduct of the sheriff, the purchaser can sustain an action on the case against that officer.²³⁰ Where a purchase is made under a decree in equity, and such decree is reversed for a jurisdictional defect in the proceedings, or where the title fails because the grantee of a mortgagor was not a party to a foreclosure, the plaintiff has the right to prosecute further proceedings. In the case first named, he may have the process properly served, and thus give the court jurisdiction to proceed. In the second named case, he may apply to the court, have the sale vacated, the satisfaction cancelled, and then, by supplemental bill, bring in the proper parties and have the property re-sold. In either case the purchaser may, by applying to the court in the original suit, have the proceedings conducted for his benefit, though in the name of the original plaintiff.²³¹ In

²²⁸ Freeman on Executions, sec. 301; Freeman on Cotenancy and Partition, sec. 547; Osterberg v. Union Trust Co., 93 U. S. 424; McManus v. Keith, 49 Ill. 389; Short v. Porter, 44 Miss. 533; Bassett v. Lockard, 60 Ill. 164; Cogan v. Frisby, 36 Miss. 185.

²²⁹ Freeman on Executions, sec. 54; Sargent v. Sturm, 23 Cal. 359; Piper v. Elwood, 4 Den. 165; Adams v. Smith, 5 Cow. 280; Watson v. Reissig, 24 Ill. 281.

²³⁰ Sexton v. Nevers, 20 Pick. 451.

²³¹ Boggs v. Hargrave, 16 Cal. 559; Burton v. Lies, 21 Cal. 87; John-

New York and Tennessee, if the proceedings are utterly void, the purchaser may recover from the plaintiff the amount paid upon the latter's judgment.²³² In Texas, if a sale under a valid judgment be void for defects in the proceedings, the purchaser is entitled to the property, unless the defendant will reimburse him for the amount he has paid toward satisfying the judgment.²³³ In Kentucky, Indiana, Illinois and Texas, if the defendant in execution has no title, he may be compelled, by proceedings in equity, to reimburse the purchaser for the amount contributed, by means of the purchase, to the satisfaction of the judgment.²³⁴ But we think the better rule is that, unless proceeding upon the ground of fraud or misrepresentation, or some other well known ground, a purchaser at an execution sale can not, by any independent action, recover of either of the parties the amount of his bid.²³⁵ Such an action is necessarily founded upon a mistake of law. The purchaser

son v. Robertson, 34 Md. 165; Cook v. Toumbs, 36 Miss. 685; Hudgin v. Hudgin, 6 Gratt, 320. See also Scott v. Dunn, 1 D. & B. Eq. 425.

²³² Chapman v. Brooklyn, 40 N. Y. 372; Schwinger v. Hickok, 53 N. Y. 280; Henderson v. Overton, 2 Yerg. 394. The principle upon which these cases profess to proceed is, that a party may recover moneys paid where there is a total failure of consideration. This principle is sufficiently supported by the authorities (Moses v. McFarlane, 2 Burr. 1009; Rheel v. Hicks, 25 N. Y. 289; Kingston Bank v. Eltinge, 40 N. Y. 391); but we doubt its applicability to execution sales.

²³³ Johnson v. Caldwell, 38 Tex. 218; Howard v. North, 5 Tex. 290. A person seeking to cancel a sheriff's deed as a cloud upon his title must, in Texas, first repay the amount for which the property was sold by the sheriff. Herndon v. Rice, 21 Tex. 457; Morton v. Welborn, 21 Tex. 773; Brown v. Lane, 19 Tex. 205.

²³⁴ McGhee v. Ellis, 4 Litt. 245; Muir v. Craig, 3 Blackf. 293; Warner v. Helm, 1 Gilm. 220; Price v. Boyd, 1 Dana, 436; Hawkins v. Miller, 26 Ind. 173; Preston v. Harrison, 9 Ind. 1; Jones v. Henry, 3 Litt. 435; Dunn v. Frazier, 8 Blackf. 432; Pennington v. Clifton, 10 Ind. 172; Richmond v. Marston, 15 Ind. 134; Julian v. Beal, 26 Ind. 220; Howard v. North, 5 Tex. 290; Arnold v. Cord, 16 Ind. 177; Taylor v. Conner, 7 Ind. 115.

²³⁵ Branham v. San Jose, 24 Cal. 585; Boggs v. Hargrave, 16 Cal. 559; Salmond v. Price, 13 Ohio. 368; Laws v. Thompson, 4 Jones, 104; Halcombe v. Loudermilk, 3 Jones, 491; The Monte Allegre, 9 Wheat. 616; Burns v. Hamilton, 33 Ala. 210.

is sure to base his claim upon the fact that he mistook the legal effect of the proceedings in the case, or of the defendant's muniments of title. And it is well known that a mistake of law is not a sufficient foundation for relief at law or in equity. The rule of *caveat emptor* unquestionably applies to judicial sales; and we know not how this rule can co-exist with another rule requiring one of the parties to indemnify the purchaser in the event of a failure of the title. In a few of the states, purchasers have been given a statutory remedy.²²⁶ The purchaser at a void execution sale may, by the payment of his bid, wholly or partly discharge some lien or claim on the property purchased. The question then arising is this: Has he the right to hold the property until the amount thus paid is refunded to him? The consideration of this question is reserved for a subsequent section.²²⁷

SEC. 48. *Ratification of Void Sales by the Acts of the Parties in Interest.*—As a general rule, a confirmation or ratification can not strengthen a void estate. "For confirmation may make a voidable or defeasible estate good, but can not operate on an estate void in law."²²⁸ If this rule be one of universal application, then there can be no necessity for considering the question of ratification in connection with void judicial sales. But this is one of those rules which are so limited by exceptions that the circumstances to which it may be applied are scarcely more numerous than those from which its application must be withheld. There can now be scarcely any doubt that void judicial sales are within the exceptions and are unaffected by the rule.²²⁹ These sales may be ratified, either directly, or by a course of conduct which estops the party from denying their validity. Thus, if the defendant in execution, after a void sale of his prop-

²²⁶ C. C. P. of Cal., sec. 708; *Halcombe v. Loudermilk*, 3 Jones, 491; *Chambers v. Cochran*, 18 Iowa, 160.

²²⁷ See secs. 49-51.

²²⁸ *Bouvier's Law. Dic.*, title "Confirmation."

²²⁹ *Maple v. Kussart*, 53 Pa. St. 348; *Johnson v. Fritz*, 44 Pa. St. 449; *Deford v. Mercer*, 24 Ia. 118; *Pursley v. Hays*, 17 Ia. 310.

erty has been made, claims and receives the surplus proceeds of the sale, with a full knowledge of his rights, his act must thereafter be treated as an irrevocable confirmation of the sale.²⁴⁰ In a case decided in Pennsylvania, a judgment was recovered against the administrator of an estate. The heirs of the decedent were not parties to the action in which this judgment was recovered, and were, therefore, under the laws of that state, unaffected by it. Under this judgment, writs were issued and lands of the decedent levied upon, condemned and sold. They produced funds more than sufficient to satisfy the judgment. The surplus was paid to the heirs. One of the daughters having brought ejectment for the lands, the Supreme Court, in discussing and determining her rights, said: "She was perfectly acquainted with the *fact* that she had not been served with process to make her a party to the judgment on which the sale was made, and that she had not voluntarily made herself a party to that proceeding without process; and there is no evidence to repel the presumption that she was equally well acquainted with the rules of *law* which entitled her to disregard a sale made under such a judgment, as having no operation whatever upon her rights, unless she did some act which, on principles of equity and common honesty, might estop her from impeaching it. As she was not a defendant in the execution, she had no right, in that character, to receive any part of the money, after payment of the creditor's claim. Her only title to the money depended upon the effect of the proceedings in divesting her estate in the land and converting it into money, by passing her title to the purchasers. Upon this ground alone could she make any claim to the money, in law or equity. The receipt of her share of the money was therefore an affirmation that her title had passed to the purchasers by

²⁴⁰ Stroble v. Smith, 8 Watts, 280; Headen v. Oubre, 2 La. An. 142; Sittig v. Morgan, 5 La. An. 574; McLeod v. Johnson, 28 Miss. 374; Southard v. Perry, 21 Ia. 488; State v. Stanley, 14 Ind. 409; Crowell v. McConkey, 5 Pa. S. 168.

virtue of the sheriff's sale ; and she can not be received to make a contrary allegation now, to the injury of those who paid their money on the faith of the conveyance. Where a sale is made of land, no one can be permitted to receive both the money and the land. Even if the vendor possessed no title whatever at the time of the sale, the estoppel would operate upon a title subsequently acquired. It was held by this court, at the late sitting in Harrisburg, that "equitable estoppels of this character apply to infants as well as adults, to insolvent trustees and guardians as well as persons acting for themselves, and have place as well where the proceeds arise from a sale *by authority of law* as where they spring from *the act of the party*."²⁴¹ The application of this principle does not depend upon any supposed distinction between a void and voidable sale. The receipt of the money, with the knowledge that the purchaser is paying it upon an understanding that he is purchasing a good title, touches the conscience, and therefore binds the right of the party in one case as well as the other."²⁴² Perhaps it is not essential that the defendant in execution should have directly received any part of the proceeds of the sale. If he knows of the sale, makes no objections thereto, and permits the proceeds to be applied to the payment of his debts, he will, at least in Pennsylvania, be precluded from denying its validity.²⁴³ If lands be sold at a partition or other chancery sale, no co-tenant who has claimed and received his share of the proceeds can deny the validity of the par-

²⁴¹ *Commonwealth v. Shuman's Administrator*, 6 Harris, 346; *McPherson v. Cunliff*, 11 S. & R. 426; *Wilson v. Bigger*, 7 W. & Ser. 111; *Stroble v. Smith*, 8 Watts, 280; *Benedict v. Montgomery*, 7 W. & Ser. 238; *Martin v. Ives*, 17 Ser. & R. 364; *Crowell v. McConkey*, 5 Barr, 168; *Hamilton v. Hamilton*, 4 Barr, 193; *Dean v. Connelly*, 6 Barr, 239; *Robinson v. Justice*, 2 Penn. Rep. 19; *Share v. Anderson*, 7 Ser. & R. 48; *Furness v. Ewing*, 2 Barr, 479; *Adlum v. Yard*, 1 Rawle, 163.

²⁴² *Smith v. Warden*, 19 Pa. St. 429.

²⁴³ *Spragg v. Shriver*, 25 Pa. St. 282; *Mitchell v. Freedley*, 10 Pa. St. 208.

tition. He can not be allowed to retain the money and regain the land.²⁴⁴ The same principle applies to sales made by guardians, administrators and executors. A ward or heir may elect to affirm a void sale, and thus entitle himself to the proceeds.²⁴⁵ When a valid election is once made, it can not be revoked. The ratification by a ward or heir of a sale made by an administrator or guardian may be made also by receiving the proceeds of the sale.²⁴⁶ Of course this ratification can not be accomplished through the action of a minor, or of any person not competent to act for himself.²⁴⁷ If the person whose property was sold be a minor, he can not ratify the sale until after he becomes of lawful age. Nor can anyone ratify for him during his minority. No act done or sanctioned by his guardian can bind him as a ratification; nor will he be held to affirm the sale merely on the ground that, during his minority, the proceeds were applied to his use or for his benefit,²⁴⁸ nor because such proceeds were accounted for by the administrator in his settlements with the estate, no part being paid over to the heir.²⁴⁹ In Missouri and Wisconsin, the receipt of the proceeds of a guardian's sale by a minor after coming of age, or by a lunatic after becoming sane, does not operate as an affirmation of the sale.²⁵⁰ The hardship of this rule is very materially ameliorated, in the states named, by the adoption of another rule, under which a *bona fide* purchaser of lands sold at a void judicial sale is entitled to retain, in many

²⁴⁴ Tooley v. Gridley, 3 S. & M. 493; Merritt v. Horne, 5 Oh. St. 307.

²⁴⁵ Jennings v. Kee, 5 Ind. 257.

²⁴⁶ Jennings v. Kee, 5 Ind. 257; Lee v. Gardner, 26 Miss. 521; Pursley v. Hays, 17 Ia. 310; Deford v. Mercer, 24 Ia. 118; Wilson v. Bigger, 7 W. & S. 111; Handy v. Noonan, 51 Miss. 166.

²⁴⁷ A *feme covert* may affirm a void sale by receiving the proceeds. Kempe v. Pintard, 32 Miss. 324.

²⁴⁸ Requa v. Holmes, 26 N. Y. 338; Wilkinson v. Filby, 24 Wis. 441; Longworth v. Goforth, Wright, 192.

²⁴⁹ Townsend v. Tallent, 33 Cal. 45.

²⁵⁰ Valle v. Fleming, 19 Mo. 454; Mohr v. Tulip, 40 Wis. 66.

cases, a charge or lien on the property for the amount paid by him. It is essential to every valid ratification, that the ratifying acts were done with a full knowledge of the facts constituting the transaction to be ratified.²⁵¹

SEC. 49. *Right of Purchasers to be Subrogated to the Lien Discharged, Denied.*—A judicial or execution sale is usually made for the purpose of satisfying some lien or charge on the property sold. After such sale is made and the amount of the bid paid, the owner of the property, if he can avoid the sale, will not only retain the property which was originally his, but will also have its value enhanced by the amount paid to remove the charge or lien therefrom. According to natural equity, it is clear that the owner ought not to thus to profit by the sale, and that the purchaser ought to be subrogated to the rights of the holder of the charge or lien. There is some doubt whether the equity, which is in fact administered by the courts, enforces, in this case, what we deem to be the dictates of natural equity. In a case decided in Indiana, an execution sale was made under a valid judgment, but the sale itself was inoperative, on account of a non-compliance with the appraisal law. The purchaser, however, claimed that he was entitled in equity to be subrogated to the rights of the judgment-creditor. The Supreme Court, in denying the claim, said: "Can the doctrine of subrogation be applied to the case made by the record? This is the main inquiry in the case. We are not advised of any direct adjudication on the point involved in this question; but there are various authorities to the effect that 'it is only in cases where the person paying the debt stands in the situation of a surety, or is compelled to pay in order to protect his own interest, or in virtue of legal process, that equity substitutes him in place of the creditor, as a matter of course, without any special agreement. A stranger paying the debt of another will not be subrogated to the creditor's right, in the absence of an agreement to that effect; payment by such

²⁵¹ Dolargue v. Cress, 71 Ill. 380.

person absolutely extinguishes the debt and security.²⁵² This exposition being correct, and we think it is, we are unable to perceive any ground upon which the decree, so far as it subrogates the plaintiffs to the rights of the judgment-creditor, can be maintained. The position of Marston was that of an ordinary vendee at a sheriff's sale, and nothing more. There is indeed nothing in the case in any degree tending to show that the protection of his interest required, or even induced the purchase. He purchased the land and paid for it, voluntarily; we must, therefore, hold that the amount which he paid to the sheriff operated as a discharge, *pro tanto*, of the creditor's judgment; and that judgment being thus satisfied, there could be no substitution."²⁵³ The quotation we have just made very fairly represents the reasoning of those courts which hold that the purchaser at a void execution or judicial sale, can not be subrogated to the rights of the holder of the lien which his payment has contributed to discharge. It must be confessed that the reasoning is in consonance with the general law of subrogation. This general law affords no encouragement to one person who voluntarily discharges the debt of another. Such a person is styled a volunteer. His acts are without compulsion, and he is therefore not classed with those persons who are compelled as sureties, or otherwise, to discharge obligations on which others are primarily responsible. The purchaser at a void judicial sale acts under a mistake of law; and this, as is well known, is barely, if ever, recognized as sufficient to induce the interposition of courts of equity. Purchasers at void probate sales have also been judged not to be entitled to subrogation to the rights of the creditors whose claims their purchases had discharged.²⁵⁴

²⁵² 1 Leading Cases in Equity, 113, and authorities there cited.

²⁵³ Richmond v. Marston, 15 Ind. 136.

²⁵⁴ Nowler v. Coit, 1 Oh. 236; Salmond v. Price, 13 Oh. 368; Lieby v. Ludlow, 4 Oh. 469. The rule in this state has been changed by statute.

SEC. 50. *Right of Purchasers at Execution and Chancery Sales to Subrogation, Affirmed.*—We pass now to the authorities in conflict with those cited in the preceding section. From these authorities it will be seen that the right of purchasers at void sales to be subrogated to the claims they have discharged by their payments, is very generally recognized in this country. In Kentucky, a slave named Jack was sold under execution against an estate, and was purchased by Enos Daniel. The slave was subsequently recovered from Daniel in an action of detinue, under a title paramount to that of the decedent. Daniel then commenced a suit in chancery to be subrogated to the rights of the holder of the judgment under which the sale had been made. The case was, therefore, one in which the title had failed, not from any defect in the sale or judgment, but because the defendant in execution was not the owner of the property. The court, nevertheless, sustained the claim for subrogation, saying: "Admitting that Enos Daniel knew that Jack belonged to Mary McLaughlin, and was not subject to execution against the estate, this, in our judgment, presents no legal impediment to his claim upon the estate, for the amount of Clark's demand paid by him. The slave was sold as the property of the estate, under the process of law; he purchased him, and, by his purchase and execution of a sale-bond to Clark, he satisfied and extinguished that amount against the estate, and for which it stood responsible. And, according to the principle repeatedly recognized in this court, he has an equitable right to be substituted in place of the creditor, and to have the amount so paid refunded to him out of the estate. His equity rests, not upon the ground of his want of knowledge as to the title of the slave, but on the ground of his having discharged a judgment against the estate, for which it stood chargeable, by a purchase of property made under the coercive process of the law; and, therefore, has equitable right to be reimbursed out of the estate."²⁵⁵ In South Carolina, a plaintiff, at his own sale, purchased the interest of the defendant in

²⁵⁵ *McLaughlin v. Daniel*, 8 Dana, 183.

certain personal property. There were older writs in the hand of the officer making the sale, and the proceeds were exclusively applied to those writs. The sale turned out to be void. The plaintiff's judgment was subsequently paid; but he was not repaid the purchase-money, which had been applied to the extinction of elder claims. In these circumstances, it was held that his "claim is that of a junior creditor who has paid prior debts, and he must be substituted in the place of the senior creditors and subrogated to all their rights."²⁵⁶ In Louisiana and Texas, if an execution sale is void for some irregularity of proceeding, but is made under a valid judgment, and the proceeds of the sale are applied to the satisfaction of the judgment, the defendant can not recover the property from the purchaser without first repaying the amount paid at the sale.²⁵⁷ When a void sale is made under proceedings to foreclose a mortgage, there seems to be no doubt that the purchaser succeeds to the title and rights of the mortgagee and may enforce them as the mortgagee could have done but for the sale.²⁵⁸

SEC. 51. *Right to Subrogation Affirmed in Favor of Purchasers at Probate Sales.*—The cases in which the equitable rule of subrogation has been most frequently invoked with success, have arisen under sales made by administrators, executors and guardians. Thus, in North Carolina, a bill in equity was filed, showing that a sale of lands had been made to plaintiff by the defendant as executor; that in a trial at law the sale had been declared void for want of authority in the executor to sell; that the purchase-money had been paid to the defendant; that \$108 of this money remained in the hands of the executor, and the balance thereof had been applied to the payment of the debts of the testator. The bill prayed that the \$108 be refunded, and that as to the balance of the purchase-money the plain-

²⁵⁶ Bentley v. Long, 1 Strob. Eq. 52.

²⁵⁷ Howard v. North, 5 Tex. 316; Dufour v. Camfranc, 11 Mart. 610.

²⁵⁸ Brobst v. Brock, 10 Wall. 519; Jackson v. Bowen, 7 Cow. 13; Gilbert v. Cooley, Walker's Ch. 494.

tiff might stand in the place of the creditors whose claims it had satisfied, and that the land be sold for the payment thereof. The following is from the opinion of the court : " The claim of the plaintiff's to be substituted to the creditors, whose demands they have satisfied, is supported, we think, by well settled principles. By the laws of this state, real as well as personal property, is liable for debts of every description ; but personal property is the primary fund for their satisfaction. It is alleged that the personal assets were insufficient for the discharge of all the debts. Whether this be the fact or not can only be ascertained by taking an account of the assets, and of the administration of them. If, in taking the account, the fact should be established as alleged, then it follows, from the doctrine sanctioned in the cases of *Williams v. Williams*,²⁵⁹ and *Saunders v. Saunders*,²⁶⁰ that the defendant Dunn would have a right in a court of equity to be subrogated to those creditors who have been paid by his advances. As between Dunn and the plaintiff, if their money were yet in his hands, he could not retain it with a safe conscience, and would be obliged to refund it. And it seems to us clear, that if he could rightfully reclaim it from his co-defendants, he might be compelled to assert this right, or permit the plaintiffs to assert it in his name, in order that it might be refunded. The court would do this upon the same principle by which the surety, on making satisfaction to the creditor, becomes entitled to demand every means of enforcing payment which the creditor himself had against the principal debtor ; a principle which, when traced to its origin, is founded on the plain obligations of humanity which bind every one to furnish to another those aids to escape from loss which he can part with without injury to himself. * * * The doctrine of substitution, which prevails in equity, is not founded on contract, but, as we have seen, on the principles of natural justice. Unquestionably the devisees are not to be injured by the mistake of the executor as to the extent of his

²⁵⁹ 2 Dev. Eq. 69.

²⁶⁰ *Ib.*, 262.

power over their land ; but that mistake should not give them unfair gains. The executor was not an officious intermeddler in paying off the debts of the testator, and his erroneous belief that he could indemnify himself in a particular way should not bar him from obtaining indemnity by legitimate means. It is not a question here whether a mistake of law shall confer any rights, but whether such a mistake shall be visited with a forfeiture of rights wholly independent of that mistake.”²⁶¹

In the case of *Valle v. Fleming's heirs*,²⁶² a void administrator's sale had been made, and the proceeds thereof applied to the payment of a mortgage existing on the lands sold. Ejectment was subsequently brought, to which the purchasers filed an equitable defense, and prayed to be subrogated to the rights of the mortgagees. Napton, Judge, in delivering the opinion of the court, referred to the equity maxims, both of the common and of the civil law, as well as to the decisions of the American courts, and concluded as follows: “Nothing could be more unjust, we may repeat, than to permit a person to sell a tract of land and take the purchase-money, and then, because the sale happens to be informal and void, to allow him, or, which is the same thing, his heir, to recover back the land and keep the money. Any code of law which would tolerate this would seem to be liable to the reproach of being a very imperfect, or a very inequitable one. We think that, upon well established principles of equity law, the owner of the land should, if he wishes to get it back, repay the purchase-money which he has received, or which he will receive if he gets the land. This may be done upon the compensation doctrine of courts of equity, with which, as it is settled on all hands, it is not inconsistent, if we regard the claim of the owner under such circumstances, as the Roman law treated it, as a case of fraud or ill faith. But whether this equity be administered under the name of compensation, or by substituting

²⁶¹ *Scott v. Dunn*, 1 Dev. & Bat. Eq. 427.

²⁶² 29 Mo. 152.

the purchaser in the place of the creditors whose debts he has paid, or by giving him the benefit of the mortgage which his money has paid off, is not material. The answer put in by the defendants should not have been stricken out, and, in order that the answer may be reinstated and the case may be tried upon these equitable principles, the judgment is reversed, and the case will be remanded."²⁸³

Nor is the claim to subrogation confined to those cases where a mortgage or some other record lien has been paid off by the sale. The estates of deceased persons are liable to be sold for the payment of the debts of the decedents, whether such debts are liens or not. If, by a sale of the lands of a decedent, his debts are paid, and it turns out that the sale is void, the purchaser has the right to be subrogated to the claims which he has, by his purchase, paid; and he has also the right to retain possession of the property as security for the repayment of the sums to which he is entitled.

The case of *Blodgett v. Hitt*²⁸⁴ discusses more thoroughly than any other with which we are familiar, the rights of purchasers under void probate sales. We copy so much of the opinion of the court as is devoted to this subject: "The evidence on this subject is, that the defendant bid off the land at the administrator's sale for three hundred and sixty-five dollars; that out of this sum he paid the Boyd mortgage, amounting to nearly two hundred and fifty dollars, and that he paid the balance of the purchase-money to the administrator. The whole of the purchase-money was applied to the payment of the mortgage, of other debts against the estate, and of the expenses of administration. The land in question stood chargeable with the payment of

²⁸³ *Valle's heirs v. Fleming's*, 29 Mo. 164. Judge Scott dissented in a vigorous and well-written opinion, saying, among other things: "The defendants are volunteers and strangers in relation to the plaintiffs. No man can make another his debtor without his consent. Nor can any man pay a debt of another without his authority and claim it of him. This is an important principle necessary to be preserved, and it is one which has had its influence in all cases in which it has been involved."

²⁸⁴ 29 Wis. 182.

such mortgage debts and expenses. The payments made by the defendant on account of his purchase enured to the benefit of the owners of the land. There is no manner of doubt but the defendant purchased the land, and paid his money therefor, in perfectly good faith, supposing that he was obtaining the whole title thereto; and there is no pretense that he had any actual notice of the defect in the proceedings before the sale which invalidates his title. The question then is, whether, under such circumstances, the defendant is entitled to be repaid the money which he has paid in good faith to relieve the land from incumbrances, before he can be turned out of possession thereof. Suppose, for illustration, that the liabilities against the estate of Pearley P. Blodgett, after the personal estate was exhausted, were just \$365, for the payment of which the land which the administrator attempted to convey to the defendant was chargeable. The interest of the heirs of Blodgett in the land was precisely that sum, less than a full and perfect title thereto. That is to say, the creditors of the intestate owned an equitable interest therein to the amount of \$365, and the heirs were the owners of the residue. Now, when the defendant, supposing in good faith that he was thereby obtaining a title to the lands, paid those debts and took a conveyance of the land from the administrator, and when it turns out that, by reason of the failure of the administrator to perform and fulfill an essential pre-requisite to a valid sale, the defendant gets no title by such conveyance, and the heirs recover the land, it must be admitted that there is no justice in giving the land to heirs, cleared of the incumbrances which the defendant has paid, without requiring them to repay the sums thus paid by him for their benefit. Otherwise, the heirs would recover a greater interest in the land than they inherited, by the sum \$365, and the defendant would be out of pocket to that amount, paid by him for their benefit. The fact that the purchase-money paid by the defendant only cancelled a small per-centage of the indebtedness against the estate, does not change the principle.

But the question is not alone—what is the natural and inherent justice of the case? but it is—are the principles and rules of equity jurisprudence, as recognized and enforced by courts of equity, sufficiently broad and comprehensive to reach the case and compel the heirs to repay the sums which the defendant has thus paid for their benefit, before they will be permitted to take possession of the land in controversy? We are of the opinion that this latter question must be answered in the affirmative, both upon principle and by authority. A brief reference will be made to a few of the leading cases wherein it has been so held.

“Hudgin v. Hudgin,”²⁸⁵ was a case where a person, by will, charged his lands with the payment of his debts. After his death, a creditor procured an order from the proper court for the sale of some portion of the lands thus made chargeable with the debts of the testator. The lands were sold, and the proceeds applied to the payment of such debts. The sale and conveyance, executed pursuant thereto, were subsequently held void, and, in ejectment brought by some of the devisees of the land against the purchaser at such sale, or the person claiming under him, the devisees recovered judgment. The defendant in the ejectment filed his bill in equity, and obtained an injunction restraining proceedings upon such judgment, and, upon proof of these facts, the Court of Appeals of Virginia directed a decree declaring the purchase-money, so paid by the complainant or his grantor, on such void sale, and the interest thereon, after deducting therefrom the rents and profits of the land while occupied by the purchaser or his grantee (exclusive of improvements made by them respectively), to be a charge on the land, and providing that, unless the same should be paid by the devisees within a reasonable time, the land be sold for the satisfaction thereof on terms to be prescribed for the purpose. This case is decided upon the principles, that the purchaser, whose money has paid the incumbrances upon the land, has the right to be substituted to the rights of the creditor

²⁸⁵ 8 Grattan, 320.

whose debt he has paid ; and, because equity will not permit such creditor or incumbrancer, lawfully in possession, to be disturbed therein until his debt or incumbrance is fully satisfied, it will not permit such purchaser, who has paid the incumbrance in good faith, and is thereby subrogated to the rights of the creditor, to be dispossessed until he is reimbursed for the moneys so paid by him.

“ *Valle’s Heirs v. Fleming’s Heirs*,²⁸⁶ is to the same effect. This is a very important and interesting case and will justify a somewhat extended notice. The action was in the nature of ejectment. The plaintiffs claimed as heirs of Valle, who died seized of the lands in controversy in the action. The defendants were in possession under certain conveyances, executed to their ancestor and his grantors by the administrators of the estate of Valle, pursuant to a sale of the land under an order of the proper court. In a former litigation, these conveyances had been adjudged to be null and void by the Supreme Court of Missouri. In their answer the defendants alleged, as an equitable defense and counter-claim, that their ancestor and his grantors purchased the lands in good faith, and paid therefor \$50,000, which moneys the administrators applied to the payment and satisfaction of a mortgage upon said lands, and perhaps other lands of which Valle died seized. The defendants claimed that, notwithstanding the apparent and technical payment and extinguishment of such mortgage, equity would, under the circumstances, treat it as still subsisting and unsatisfied, for the protection of the purchasers from the administrators, or their grantees, and would subrogate such purchasers or grantees to all of the rights of the mortgagee, treating them as assignees and purchasers of the mortgage for a valuable consideration by them paid. They also claimed that they were, in fact and in equity, in possession of the land in controversy as assignees of said mortgage, and fully entitled to set up the same against any person attacking their rights or possession thereto. The court below rejected these views of the case, and struck out

²⁸⁶ 29 Mo. 152.

from the answer such equitable defense and counter-claim ; but the supreme court reversed the judgment below for that reason, and in a very able opinion by Judge Napton, a majority of the court fully sustain the theory of the defendants, that they were entitled to the equitable protection of the court as mortgagees in possession under an unpaid mortgage, and that their possession could not be disturbed until an account should be taken, and the sum ascertained to be equitably due to them on the mortgage, fully paid. In that case Judge Scott delivered a dissenting opinion, wherein he claims that the views of the majority of the court are unsustained by the cases ; that the decision creates a new equity, or rather injects a new principle into the equity jurisprudence of the country ; and further, that the defendant's ancestor and his grantors, who paid their money under a void sale and conveyance, were mere volunteers ; and, because a man may not pay the debt of another without his authority and claim it of him, the learned judge concludes that the defendants (who had succeeded to all of the rights of the original purchasers) could not be subrogated to the rights of the mortgagee, and recover of the heirs, or out of the land, the money which was thus voluntarily paid on a void conveyance. It is believed that both these positions are untenable. That this is no new equity—one first recognized and asserted in that case—is abundantly shown by a reference to the cases cited in the majority opinion. Some of these cases will be hereinafter mentioned. Again, the lands having been purchased of the administrator in good faith, and at a sale which had been ordered to be made by the proper court, and the purchasers having paid a valuable consideration for the land, in the belief that they were obtaining a good title thereto, it can not be said, in any reasonable or just sense, that they were mere volunteers. On the contrary, they paid their money at the request and by the procurement of the administrators ; and, inasmuch as the administrators were charged by law with the duty of converting the assets and paying

the debt, it may well be held that they were the representatives of the heirs to the extent that the latter should be held bound by such request, and should not be heard to allege that the purchasers, whose money went to pay the incumbrance upon the land, were mere volunteers. The judge also speaks of the distinction between trusts and powers, and says that because the administrators have nothing but a mere power, without an interest, the land can not be affected by their conveyance thereof, unless the power is executed pursuant to the terms of the statute by which it is conferred. In this the learned judge is doubtless correct, as he would have been had he said further, that where, as in that case, a power is created by law, equity will not relieve against a defective execution of it. But the result of these principles is not that a purchaser in good faith at an administrator's sale is not entitled, in a case where the conveyance to him has been adjudged void, to be repaid by the heir, or out of the land, the money paid by him for such void conveyance, and applied in payment and satisfaction of incumbrances upon the estate; but only that the power having been defectively executed, the conveyance is void, and a court of equity has no jurisdiction or authority to heal the defect and make it valid.

“The foregoing case was decided mainly upon the authority of the case of *Bright v. Boyd*.²⁶⁷ This is perhaps the leading case on the question under consideration. Boyd, the defendant, had recovered judgment in an action of ejectment for certain premises in the possession of Bright, the complainant, whereupon Bright filed his bill in equity against Boyd, alleging that he was in possession of the premises in controversy, by intermediate conveyances from the administrator with the will annexed of the estate of John P. Boyd, the father of defendant, but that the title under the administrator's deed had failed, or rather, that the same conveyed no title by reason of the failure of the administrator to comply with certain requirements of the law, which were held to be essential to the validity of the sale; and that the complain-

²⁶⁷ 1 Story, 478, and 2 Ib. 605.

ant, or those under whom he claimed, in good faith, and believing that the deed from the administrator conveyed a good title to the premises, had made valuable and permanent improvements thereon. The object of the bill was to make the value of such improvements a charge upon, and to enforce payment therefor out of the premises which the defendant had recovered in the ejectment suit. The defendant, Boyd, made title to the land as devised under the will of his father. On proof of these allegations, Mr. Justice Story, before whom the cause was heard, after great deliberation and research, gave the complainant the relief prayed in the bill, and, in the absence of any statutory provision on the subject, held the broad doctrine that 'a *bona fide* purchaser for a valuable consideration, without notice of any defect in his title, who makes improvements and meliorations upon the estate, has a lien or charge thereupon for the increased value which is thereby given to the estate beyond its value without them, and a court of equity will enforce the lien or charge against the true owner, who recovers the estate in a suit at law against the purchaser.'

"The principle there asserted is precisely the same as that involved in the question under consideration in this case. In both cases, if the land is held chargeable, it is because the money of the purchaser under the void sale has been paid in good faith, and expended to increase the value of the estate. It is quite immaterial whether this was done by paying off incumbrances, or by making permanent and valuable improvements. In either case, the value of the inheritance is increased by the expenditure, and, as already observed, the plainest principles of justice demand that the heir or devisee should repay the money thus innocently expended for his benefit, to the extent that he has been benefited thereby. The opinion of Judge Story in *Bright v. Boyd* is exceedingly learned and able, and will well repay careful perusal and study. He traces the principle which he applied there to the Roman law, and shows that it has been adopted into the laws of all modern nations which derive their

jurisprudence from the Roman law, and demonstrates, by reference to the writings of Cujacius, Pothier, Grotius, Bell, Puffendorf, Rutherforth, and others, and by arguments which seem conclusive of the question, that 'such principle has the highest and most persuasive equity, as well as common sense and common justice, for its foundation.' We are not aware that the authority of that case has ever been shaken, or its correctness ever successfully assailed.

"Before dismissing the case of *Bright v. Boyd* from our consideration, I may be permitted to transcribe a passage from the opinion, to show how identical in principle that case is with the present one, and also to show the views of the eminent jurist who wrote the opinion, upon the precise question involved in this case. Judge Story there says that 'it can not be overlooked that the lands of the testator, now in controversy, were sold for the payment of his just debts, under the authority of law, although the authority was not regularly executed by the administrator in his mode of sale, by a non-compliance with one of the prerequisites. It was not, therefore, in a just sense, a tortious sale; and the proceeds thereof, paid by the purchaser, have gone to discharge the debts of the testator, and so far the lands in the hands of the defendant (*Boyd*) have been relieved from a charge to which they were liable by law. So that he is now enjoying the lands free from a charge which, in conscience and equity, he, and he only, and not the purchaser, ought to bear. To the extent of the charge from which he has thus been relieved by the purchaser, it seems to me that plaintiff, claiming under the purchaser, is entitled to reimbursement, in order to avoid circuity of action, to get back the money from the administrator, and thus subject the lands to a new sale, or at least, in his favor, in equity to the old charge. I confess myself to be unwilling to resort to such a circuity in order to do justice, where, upon the principles of equity, the merits of the case can be reached by affecting the lands directly with a charge to which they are *ex æquo et bono* in the hands of the present defendant, clearly liable.'²⁸³

²⁸³ 1 Story, 493.

"After what has been already said concerning the rule of the civil law on this subject, we should expect to find the courts of Louisiana asserting and enforcing that rule. Accordingly, we find in *Dufour v. Camfranc*,²⁶⁹ the following language: 'It has been proved that the proceeds arising from the sale of the slaves were applied to the discharge of the judgment debts of the plaintiff, and the court is of opinion that he can not recover in the suit until he repay that money. * * * Nothing could be more unjust than to permit a debtor to recover back his property because the sale was irregular, and yet allow him to profit by that irregular sale to pay his debts.' It will be readily inferred from the foregoing extracts, that the action was brought to recover certain slaves which the defendant had purchased at a sheriff's sale upon an execution, which sale, it was afterwards held, was void and transferred no title to the slaves to the purchaser, but the proceeds of the sale went to pay judgment debts against the plaintiff. * * * We hold, therefore, that the whole purchase-money paid by the defendant for the land in controversy, and the interest thereon, less the mesne profits of the land (exclusive of the improvements placed thereon by him) during his occupancy thereof, is a lien and charge upon the land, and that the plaintiffs can not have restitution of the land claimed by them until the amount of such lien and charge is paid.'²⁷⁰

²⁶⁹ 11 Martin, 607, (2 Cond. La. Reports, 243.)

²⁷⁰ *Blodgett v. Hitt*, 29 Wis. 182. The following cases are in harmony with the one just cited: *Bright v. Boyd*, 2 Story C. C. 605; *Mohr v. Tulip*, 40 Wis. 66; *Grant v. Lloyd*, 12 S. & M. 191; *Levy v. Riley*, 4 Oregon, 392; *Chambers v. Jones*, 72 Ill. 275; *Short v. Porter*, 44 Miss. 533; *Williamson v. Williamson*, 3 S. & M. 715; *Douglass v. Bennett*, 51 Miss. 680; *Hudgin v. Hudgin*, 6 Gratt. 320; *Winslow v. Crowell*, 32 Wis. 639; *Dunbar v. Creditors*, 2 La. An. 727; *Stockton v. Downey*, 6 La. An. 581; *Ragland v. Green*, 14 S. & M. 194. "If the sale be void, or voidable, the lien of the administrator continues; and it would seem equitable that the purchaser, who has paid the debts of the estate, should have a lien on the estate for his purchase-money." *Haynes v. Meeks*, 10 Cal. 110. A purchaser has no claim against the heirs, nor their estate, for purchase-money which he fails to show has been applied for their benefit. *Jayne v. Boisgerard*, 39 Miss. 796.

SEC. 52. *Right to Subrogation, when Purchaser is Guilty of Fraud.*—It is a familiar principle that whoever seeks equity must come with clean hands. Nearly all the cases in which relief has been granted to purchasers at void sales have proceeded upon the express ground that the purchaser had acted in good faith, and in ignorance of the irregularity by which his title was impaired. Certainly in all such cases the purchaser's good faith ought to be regarded as material. In Pennsylvania, if a purchaser be guilty of a fraud, on account of which his purchase is adjudged void, he can not reclaim his purchase money. He, in effect, forfeits it to those whom he sought to defraud, for they may retain the money and recover the estate.²⁷¹ In Mississippi, on the other hand, a fraudulent purchaser may assert the same equities as one who has acted in good faith.²⁷²

SEC. 53. *Purchaser's Right to the Aid of Equity in Supplying Omissions and Mistakes.*—In every case where a purchaser has in good faith made and complied with his bid, his equities are of a very persuasive character, and usually appeal to our sense of justice more strongly than the equities of him who seeks to avoid the sale without placing the purchaser *in statu quo*. In many cases it is apparent that the vice which renders the sale a nullity has not, in fact, operated to the detriment of him whose property was sold. All the parties may have supposed the proceedings to be regular; the biddings may have been spirited; the price realized may have equalled or perhaps exceeded the value of the property; the proceeds of the sale may have all been applied in the manner directed by law; and still some act or omission, unnoticed at the time, may render the purchaser's title utterly void at law. In such a case our sense of justice revolts at the thought that he may be without redress. We naturally expect that equity will interpose to supply the omission, or that, on

²⁷¹ *McCaskey v. Graff*, 23 Pa. S. 321; *Gilbert v. Hoffman*, 2 Watts, 66; *Jackson v. Summerville*, 13 Pa. S. 359.

²⁷² *Grant v. Lloyd*, 12 S. & M. 191.

such terms as may be just, it will enjoin the parties in interest from availing themselves of an error which clearly has not impaired their rights. But on seeking relief, we are at once confronted with the reminder that, "in cases of defective execution of powers, we are carefully to distinguish between powers which are created by private parties, and those which are specially created by statute; as, for instance, powers of tenants in tail to make leases. The latter are construed with more strictness, and, whatever formalities are required by the statute, must be punctually complied with, otherwise the defect can not be helped, or, at least, may not, perhaps, be helped in equity; for courts of equity can not dispense with the regulations prescribed by statute; at least, where they constitute the apparent policy and object of the statute."²⁷³ Perhaps this language, owing to the author's timidity of expression, may not necessarily dispose of the purchaser's claim for relief. The other authorities are more decisive, especially with regard to execution, judicial and probate sales. Thus, in a case decided by Judge Story, it appeared that an administrator's sale had been regularly licensed, and that all the requirements of the statute had been respected, save that requiring a bond to be given and approved prior to the sale. The judge, in his opinion, said: "Upon this case coming out on the trial of the action at law (a writ of entry) the court held that the giving of the bond was by law an essential prerequisite to the sale, and, it not having been complied with, the sale was consequently invalid, and passed no title to the purchaser. It is now argued that, however correct this doctrine may be at law, yet, in a court of equity, the omission to give the bond within a stipulated time ought not to be held a fatal defect, but it should be treated as a mistake, or inadvertence, or accident properly remediable in

²⁷³ Story's Eq. Jur. sec. 96. See *Ib.*, sec. 177; 1 Lead. Cas. in Eq., 4th Am. Ed. 379; Freeman on Executions, sec. 332; *Tiernan v. Beam*, 2 Oh. 465; *Ware v. Johnson*, 55 Mo. 500; *Moreau v. Branham*, 27 Mo. 351; *McBryde v. Wilkinson*, 29 Ala. 662.

a court of equity. We do not think so. The mistake was a voluntary omission, or neglect of duty, and in no just sense an accident. But, if it were otherwise, it would be difficult in the present case to sustain the argument. This is not the case of the defective execution of a power created by the testator himself, but of a power, created and regulated by statute. Now, it is a well settled doctrine that, although courts of equity may relieve against the defective execution of a power created by a party, yet they can not relieve against the defective execution of a power created by law, or dispense with any of the formalities required thereby for its due execution ; for otherwise the whole policy of the legislative enactments might be overturned. There may, perhaps, be exceptions to this rule ; but if there be, the present case does not present any circumstances which ought to take it out of the general rule. Therefore it seems to us that the non-compliance with the statute prerequisites, in the present case, is equally fatal in equity as it is in law.''²⁷⁴

In Illinois, certain heirs recovered a judgment in ejectment for lands purchased at a guardian's sale. The defect in the purchaser's title was the omission of the guardian to report the proceedings under the order of sale. The purchaser then filed a bill to enjoin the execution of the judgment in ejectment, and for general relief. The supreme court decided that the bill must be dismissed. Caton, J., in delivering the opinion of the court, considered and approved the views expressed by Judge Story in his *Commentaries*, and also in *Bright v. Boyd*, both of which have been quoted in this section. He further said : " If chancery may interfere and dispense with one of the requirements of the statute, it may with another, and thus in its unlimited discretion it may fritter away the whole statute. It is seriously claimed that, because the purchaser purchased in good faith and paid the full value of the property to the guardian of the owners, thereby an equity is raised in

²⁷⁴ *Bright v. Boyd*, 1 Story C. C. 486.

his favor and against them, which the court will enforce. Equities do not arise upon statutory acts without the violation of those against whom the equity is charged. Suppose this guardian, seeing that a case existed which would require the circuit court to order a sale of the infant's estate, and in ignorance of the law, but in all honesty, had sold the estate for its full value, without an order of court, to a purchaser who, in good faith, supposed he was getting a good title; in that case the purchaser's equity would be just as strong as is the equity in this case; and, should we now hold that the purchaser here acquired an equitable title which should be enforced against the heir, it would be equally our duty, when the supposed case arises, to compel a conveyance to the purchaser; and then the entire statute would be gone. But the truth is, the purchaser at these statutory sales gets no imperfect equitable title which may be perfected in chancery; he gets the whole title which the infant had, or he gets no title whatever."²⁷⁵

As equity will not supply an act omitted inadvertently or otherwise, so it will not correct a mere mistake, nor relieve the purchaser from the consequences of a mistake. Thus, if by mistake part of a tract intended to be embraced in an order of sale is omitted therefrom, or if a tract altogether different from the one intended is inserted therein, and the error passes unnoticed until after the sale, equity can not relieve the purchaser nor give him the tract which he supposed he was buying and which the administrator or other officer intended to sell.²⁷⁶ In Iowa, this rule seems to be ignored. A judgment was entered in that state for the sale of a part of several lots of land. From the execution and other proceedings subsequent to judgment, one of these lots was omitted. After the sale and delivery of the deed, the purchaser discovered the omission. By a proceeding in equity, he succeeded in setting aside the sale and the satisfaction of the judgment thereby produced, and obtained

²⁷⁵ *Young v. Dowling*, 15 Ill. 481, 485.

²⁷⁶ *Dickey v. Beatty*, 14 Oh. St. 389; *Mahan v. Reeve*, 6 Blackf. 215; *Ward v. Brewer*, 19 Ill. 291; *Rogers v. Abbott*, 37 Ind. 138.

leave to issue a new execution in conformity with his judgment.²⁷⁷ This case, it will be seen, did not validate a void sale. It did, however, give relief which ultimately proved as effectual; for it gave the right to make a sale of property which had not been sold at all.

While equity will not usually aid the defective execution of a statutory power, we judge that this rule can not prevail where all the prerequisites prescribed by law have been observed, but the purchaser has either received no conveyance or one which is not such as he is entitled to receive. In this case, the parties whose property was sold will be enjoined from availing themselves of the omission,²⁷⁸ or the officer will be compelled to perform his duty by executing a conveyance in proper form.²⁷⁹

CHAPTER VI.

THE CONSTITUTIONALITY OF CURATIVE STATUTES.

SECTION 54. Curative Statutes upheld by Supreme Court of United States.

SEC. 55. Curative Statutes confirming Irregular Judicial Proceedings.

SEC. 56. Curative Statutes confirming Void Judicial Proceedings.

SEC. 57. Defects, other than Jurisdictional, which are pronounced Incurable.

SEC. 58. Informalities which may be Waived by Subsequent Statutes.

SEC. 59. Limitation on Effect of Curative Statutes.

SEC. 60. General Reflections concerning Curative Statutes.

SEC. 54. *Curative Statutes upheld by Supreme Court of United States.*—Numerous statutes have been enacted, professing to validate judicial sales and proceedings which,

²⁷⁷ Snyder v. Ives, 42 Ia. 157.

²⁷⁸ Wortman v. Skinner, 1 Beas. 358; De Riemer v. De Cantillon, 4 Johns. Ch. 85.

²⁷⁹ Jelks v. Barrett, 52 Miss. 315; Stewart v. Stokes, 33 Ala. 494; Freeman on Ex., sec. 332. Probably a sheriff's deed may be reformed in equity in Indiana and New York. Johns v. DeRome, 5 Blackf. 421; Bartlett v. Judd, 21 N. Y. 200. Deeds of commissioners and administrators may, in certain cases, be reformed by equitable actions in Missouri. Houx v. County of Bates, 61 Mo. 391; Grayson v. Weddle, 63 Mo. 523.

without the aid of such statutes, were unquestionably inoperative, both at law and in equity. Such statutes are clearly retrospective. They also take at least the legal title away from its owner and vest it in another person, without due process of law. They usually, if not universally, do even more than this ; for they give force to titles which are not less void in equity than at law. They have, therefore, been questioned as conflicting with express constitutional provisions, and also as violating some principles which, even without any direct constitutional expression, must be admitted to prevail under every civilized form of government.²⁸⁰

We shall first call attention to a case which, as it arose in a State then having no constitution, may perhaps be accepted as an authoritative determination of this question, where it is to be answered solely from the Constitution of the United States, as that instrument stood before the adoption of the 14th Amendment. Jonathan Jenckes died in New Hampshire, leaving a will which was there admitted to probate. The executrix obtained a license of the judge of probate in New Hampshire, purporting to authorize her to sell lands in Rhode Island. Under this license, she sold and conveyed lands in the last named State. The sale was confessedly void, because the courts of New Hampshire had no jurisdiction over lands situate in another State. She made an application to the legislature of Rhode Island, stating the facts in her petition, and thereupon an act was passed, at the June session of 1792, ratifying and confirming the title based on her sales and conveyances.

In determining the constitutionality of this act, Mr. Justice Story, delivering the opinion of the Supreme Court of the United States, said : “ Rhode Island is the only State in the Union which has not a written constitution of government, con-

²⁸⁰ For an annunciation of the rule that there must necessarily be some restraints upon legislative authority in every free and civilized country, independent of direct constitutional prohibitions and assurances, see *Calder v. Bull*, 3 Dall. 386; *Wilkinson v. Leland*, 2 Pet. 656; *Loan Association v. Topeka*, 20 Wall. 663; *Story on the Const.*, sec. 1339.

taining its fundamental laws and institutions. Until the revolution in 1776, it was governed by the charter granted by Charles II. in the fifteenth year of his reign. That charter has ever since continued in its general provisions to regulate the exercise and distribution of the powers of government. It has never been formally abrogated by the people, and, except so far as it has been modified to meet the exigencies of the revolution, may be considered as now a fundamental law. By this charter, the power to make laws is granted to the General Assembly in the most complete manner, 'so as such laws, etc., be not contrary and repugnant unto, but as near as may be agreeable to, the laws, etc., of England, considering the nature and constitution of the place and people there.' What is the true extent of the power thus granted, must be open to explanation, as well by usage as by construction of the terms in which it is given. In a government professing to regard the great rights of personal liberty and of property, and which is required to legislate in subordination to the general laws of England, it would not lightly be presumed that the great principles of Magna Charta were to be disregarded, or that the estates of its subjects were liable to be taken away without trial, without notice, and without offense. Even if such authority could be deemed to have been confided by the charter to the General Assembly of Rhode Island, as an exercise of transcendental sovereignty, before the revolution, it can scarcely be imagined that that great event could have left the people of that State subjected to its unconditioned and arbitrary exercise. That government can scarcely be deemed to be free, where the rights of property are left solely dependent upon the will of a legislative body, without any restraint. The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred. At least no court of Justice in this country would be warranted in assuming that the power to violate and disregard them—a power so repugnant to the common principles of justice and

civil liberty—lurked under any general grant of legislative authority, or ought to be implied from any general expressions of the will of the people. The people ought not to be presumed to part with rights so vital to their security and well-being, without very strong and direct expressions of such an intention.

“In *Terret v. Taylor*,²⁸¹ it was held by this court, that a grant or title to lands once made by the legislature to any person or corporation, is irrevocable, and can not be re-assumed by any subsequent legislative act, and that a different doctrine is utterly inconsistent with the great and fundamental principle of a republican government, and with the rights of the citizens to the free enjoyment of their property lawfully acquired. We know of no case in which a legislative act to transfer the property of A to B, without his consent, has ever been held a constitutional exercise of legislative power in any state in the Union. On the contrary, it has been constantly resisted, as inconsistent with just principles, by every judicial tribunal in which it has been attempted to be enforced. We are not prepared, therefore, to admit that the people of Rhode Island had ever delegated to their legislature the power to divest the vested rights of property and transfer them without the assent of the parties. The counsel for the plaintiffs have themselves admitted that they can not contend for any such doctrine.

“The question then arises, whether the act of 1792 involves any such exercise of power. It is admitted that the title of an heir by descent in the real estate of his ancestor, and of a devisee in an estate unconditionally devised to him, is, upon the death of the party under whom he claimed, immediately devolved upon him, and he acquires a vested estate. But this, though true in a general sense, still leaves his title incumbered with all the liens which have been created by the party in his lifetime, or by the law at his decease. It is not an unqualified, though it be a vested interest, and it confers no title, except to what remains

²⁸¹ 9 Cranch, 43.

after every such lien is discharged. In the present case, the devisee, under the will of Jonathan Jenckes, without doubt, took a vested estate in fee in the lands in Rhode Island. But it was an estate subject to all the qualifications and liens which the laws of that state annexed to those lands. It is not sufficient, to entitle the heirs of the devisee now to recover, to establish the fact that the estate so vested had been divested, but that it has been divested in a manner inconsistent with the principles of law.

“By the laws of Rhode Island, as indeed by the laws of the other New England states (for the same general system pervades them on this subject), the real estate of testators and intestates stands chargeable with the payment of their debts, upon a deficiency of assets of personal estate. The deficiency being once ascertained in the probate court, a license is granted by the proper judicial tribunal, upon the petition of the executor, or administrator, to sell so much of the real estate as may be necessary to pay the debts and incidental charges. The manner in which the sale is made is prescribed by the general laws. In Massachusetts and Rhode Island, the license to sell is granted, as matter of course, without notice to the heirs or devisees, upon the mere production of proof from the probate court of the deficiency of personal assets. And the purchaser at the sale, upon receiving a deed from the executor or administrator, has a complete title, and is in immediately under the deceased, and may enter and recover possession of the estate, notwithstanding any intermediate descents, sales, disseizins, or other transfers of title or seizin. If, therefore, the whole real estate be necessary for the payment of debts, and the whole is sold, the title of the heirs or devisees is, by the general operations of law, divested and superseded; and so, *pro tanto*, in case of a partial sale.

“From this summary statement of the laws of Rhode Island, it is apparent that the devisee under whom the present plaintiffs claim, took the land in controversy, subject to the lien for the debts of the testator. Her estate

was a defeasible estate, liable to be divested upon a sale by the executrix, in the ordinary course of law, for the payment of such debts, and all that she could rightfully claim would be the residue of the real estate after such debts were fully satisfied. In point of fact, as it appears from the evidence in the case, more debts were due in Rhode Island than the whole value for which all the estate there was sold; and there is nothing to impeach the fairness of the sale. The probate proceedings further show, that the estate was represented to be insolvent; and, in fact, it approached very near to an actual insolvency. So that, upon this posture of the case, if the executrix had proceeded to obtain a license to sell, and had sold the estate according to the general laws of Rhode Island, the devisee and her heirs would have been divested of their whole interest in the estate, in a manner entirely complete and unexceptionable. They have been divested of their formal title in another manner, in favor of creditors entitled to the estate; or rather, their formal title has been made subservient to the paramount title of the creditors.

“Some suggestions have been thrown out at the bar, intimating a doubt whether the statutes of Rhode Island, giving to its courts authority to sell lands for payment of debts, extended to cases where the deceased was not at the time of his death an inhabitant of the state. It is believed that the practical construction of these statutes has been otherwise. But it is unnecessary to consider whether that practical construction be correct or not, inasmuch as the laws of Rhode Island, in all cases, make the real estate of persons deceased chargeable with their debts, whether inhabitants or not. If the authority to enforce such a charge by a sale, be not confided to any subordinate court, it must, if at all, be exercised by the legislature itself. If it be so confided, it still remains to be shown that the legislature is precluded from a concurrent exercise of power.

“What, then, are the objections to the act of 1792? First, it is said that it divests vested rights of property.

But it has been already shown that it divests no such rights, except in favor of existing liens, of paramount obligation, and that the estate was vested in the devisee, expressly subject to such rights. Then, again, it is said to be an act of judicial authority which the legislature was not competent to exercise at all; or, if it could exercise it, it could be only after due notice to all the parties in interest, and a hearing and decree. We do not think that the act is to be considered as a judicial act, but as an exercise of legislation. It purports to be a legislative resolution, and not a decree. As to notice, if it were necessary (and it certainly would be wise and convenient to give notice, where extraordinary efforts of legislation are resorted to, which touch private rights), it might well be presumed, after the lapse of more than thirty years and the acquiescence of the parties for the same period, that such notice was actually given. But by the general laws of Rhode Island upon this subject, no notice is required to be, or is in practice given to heirs or devisees, in cases of sales of this nature; and it would be strange if the legislature might not do, without notice, the same act which it would delegate authority to another to do without notice. If the legislature had authorized a future sale by the executrix for the payment of debts, it is not easy to perceive any sound objection to it. There is nothing in the nature of the act which requires that it should be performed by a judicial tribunal, or that it should be performed by a delegate, instead of the legislature itself. It is remedial in its nature, to give effect to existing rights.

“But it is said that this a retrospective act, which gives validity to a void transaction. Admitting that it does so, still it does not follow that it may not be within the scope of the legislative authority, in a government like that of Rhode Island, if it does not divest the settled rights of property. A sale had already been made by the executrix under a void authority, but in entire good faith (for it is not attempted to be impeached for fraud), and the proceeds, constituting a fund for the payment of creditors, were ready to be distrib-

uted as soon as the sale was made effectual to pass the title. It is but common justice to presume that the legislature was satisfied that the sale was *bona fide* and for the full value of the estate. No creditors have ever attempted to disturb it. The sale, then, was ratified by the legislature, not to destroy existing rights, but to effectuate them, and in a manner beneficial to the parties. We can not say that this is an excess of legislative power, unless we are prepared to say that, in a state not having a written constitution, acts of legislation having a retrospective operation are void as to all persons not assenting thereto, even though they may be for beneficial purposes and to enforce existing rights. We think that this can not be assumed, as a general principle, by courts of justice. The present case is not so strong in its circumstances as that of *Calder v. Bull*,²⁸² or *Rice v. Parkman*,²⁸³ in both of which the resolves of the legislature were held to be constitutional."²⁸⁴

SEC. 55. *Confirming Irregular Judicial Proceedings.*—The decision just quoted is extreme in its character, in this, that it affirms the constitutionality of a statute which confirmed proceedings that had, of themselves, not even the shadow of validity. The defect in the title made good by this statute, did not arise from any irregular exercise of existing authority, but from the palpable absence of all authority whatsoever. The court under which the executrix had acted was notoriously without jurisdiction in the matter. In so far as this decision maintains that proceedings prosecuted without jurisdiction over the person or subject-matter may be subsequently validated by legislative action, we think it is squarely in conflict with the opinions of the jurists of the present age. But mere irregularities of proceeding, though of so grave a character as to render a judicial or executive sale inoperative, may be deprived of their evil consequences by subsequent legislation. In Penn-

²⁸² 3 Dall. Rep. 386.

²⁸³ 16 Mass. Rep. 326.

²⁸⁴ *Wilkinson v. Leland*, 2 Pet. 656.

sylvania, a judgment prematurely entered was confirmed by an act of the legislature, after a sale of the defendant's property had been made under it. "The error in entering the judgment," said the court, "is cured by the confirming act; the constitutionality of this no man can doubt. It impaired no contract, disturbed no vested right, and if ever there was a case in which the legislature ought to stretch forth its strong arm to protect a whole community from an impending evil, caused by mere slips, this was the occasion. Confirming acts are not uncommon—are very useful; deeds acknowledged defectively by *feme covert*s have been confirmed, and proceedings and judgments of commissioned justices of the peace, who were not commissioned agreeably to the constitution, or where their power ceased on the division of the counties, until a new appointment. This law is free from all the odium to which retrospective laws are generally exposed. Where a law is in its nature a contract, where absolute rights are vested under it, a law retrospectively, even if constitutional, would not be extended by any liberal construction, nor would it be construed, by any general words, to embrace cases where actions are brought. Retrospective laws, which only vary the remedies, divest no right, but merely cure a defect in a proceeding otherwise fair—the omission of formalities which do not diminish existing obligations, contrary to their situation when entered into and when prosecuted; for one is consistent with every principle of natural justice, while the other is repugnant. The plaintiff in error could not be injured, whether the judgment was entered on the Monday or Wednesday of the week. It did not deprive him of any opportunity of defense. If he filed a counter statement or plea, appeared and took defense any time in the week, the court would have received it."²⁸⁵ But, as a general rule, the courts will not uphold statutes which interfere with the effect of their pre-existing judgments.²⁸⁶ In Indiana, however, a curative

²⁸⁵ Underwood v. Lilly, 10 S. & R. 97.

²⁸⁶ Hence, the legislature can not authorize a court to re-open its judg-

act was held valid which made valid the proceedings of a term of court held without authority of law.²⁸⁷ But, in this state, the extreme ground is maintained, that a legislature may always make void acts valid, unless restrained by some direct constitutional provision.²⁸⁸ In Massachusetts, an executor's sale was confirmed, in a case where she had given no notice as prescribed by law of her petition for the license to sell, and the confirmatory act was declared valid. But in this case the heirs had, in writing, assented to the sale.²⁸⁹

SEC. 56. *Proceedings Based on Void Judgments can not be Validated.*—One of the limitations on the enactment of valid curative statutes is, that a legislature can not make immaterial, by subsequent enactment, an omission which it had no authority to dispense with by previous statute.²⁹⁰ It is usually understood that the legislature has no power to authorize an adjudication against a person without giving him any opportunity of making his defense. This he can not make unless he has some notice of the proceeding against him. There must be something to give the court jurisdiction over his person. If, therefore, the proceedings had in a court are prosecuted without jurisdiction, the legislature can not subsequently make them valid.²⁹¹ An act was passed by the legislature of Illinois, and, being invoked for the purpose of sustaining proceedings where no service of summons had been made on the defendants, its validity was denied in an opinion by Caton, C. J., in the course of

ments after the time for appeal has expired. *De Chastellux v. Fairchild*, 15 Pa. St. 18; *Hill v. Town of Sunderland*, 3 Vt. 507; *Davis v. Menasha*, 21 Wis. 491; *Taylor v. Place*, 4 R. I. 324; *Lewis v. Webb*, 3 Greenl. 326; *Denny v. Mattoon*, 2 Allen, 379, overruling *Braddee v. Brownfield*, 2 W. & S. 271.

²⁸⁷ *Walpole v. Elliott*, 18 Ind. 258.

²⁸⁸ *Ib.*; *Andrews v. Russell*, 7 Blackf. 474; *Grimes v. Doe*, 8 Blackf. 371.

²⁸⁹ *Sohier v. Mass. Gen'l Hospital*, 3 Cush. 483.

²⁹⁰ *State v. Squires*, 26 Ia. 340.

²⁹¹ *Hopkins v. Mason*, 61 Barb. 469; *Hart v. Henderson*, 17 Mich. 218; *Griffin v. Cunningham*, 20 Gratt. 109; *Lane v. Nelson*, 79 Pa. St. 407; *Pryor v. Downey*, 50 Cal. 389.

which he said: "If it was competent for the legislature to make a void proceeding valid, then it has been done in this case. Upon this question we can not for a moment doubt or hesitate. They can no more impart a binding efficacy to a void proceeding than they can take one man's property from him and give it to another. Indeed, to do the one is to accomplish the other. By the decree in this case, the will in question was declared void, and, consequently, if effect be given to the decree, the legacies given to those absent defendants will be taken from them and given to others, according to our statutes of descents. Until the passage of the act in question, they were not bound by the verdict of the jury in this case, and it could not form the basis of a valid decree. Had the decree been rendered before the passage of the act, it would have been as competent to make that valid as it was to validate the antecedent proceedings, upon which alone the decree could rest. The want of jurisdiction over the defendants was as fatal to the one as it could be to the other. If we assume the act to be valid, then the legacies, which before belonged to the legatees, have now ceased to be theirs, and this result has been brought about by the legislative act alone. The effect of the act upon them is precisely the same as if it had declared, in direct terms, that the legacies bequeathed by this will to these defendants should not go to them, but should descend to the heirs at law of the testator, according to our law of descent. This, it will not be pretended, they could do directly, and they had no more authority to do it indirectly, by making proceedings binding upon them which were void at law." ²⁹² In the case just cited, no sale had been made. It was a suit in equity to set aside a will. A trial had been had, resulting in favor of the plaintiffs. It was then discovered that certain non-resident minor defendants, who had answered by guardian *ad litem*, had not been properly served with process. The effect sought by the statute was simply to validate a void judgment. In the case of Nelson

²⁹² *McDaniel v. Correll*, 19 Ill. 228.

v. Rountree,²³³ it appeared that a judgment had been entered in an action in which the summons was served by publication. There was no authority for such service, because the affidavit for the order of publication failed to show that a cause of action existed against the defendants. The judgment was therefore void. The legislature subsequently declared that "all orders of publication heretofore made shall be evidence that the court or officer authorized to grant the same was satisfied of the existence of all the facts requisite to granting such order or orders, and shall be evidence of the existence of such facts." Perhaps the constitutionality of this statute might have been maintained on the ground that it simply created a rule of evidence, or shifted the burden of proof from one person to another.²³⁴ The supreme court of the state, however, regarded it as a confirmatory act, and denounced it as follows: "If it was competent for the legislature to make this declaration, then it was competent for it to have declared that to be a judgment which was before no judgment, and binding on the party against whom formally rendered, when before he was not bound at all; for such is the direct result. It is a proposition, not now to be discussed at this day, that the legislature has no such power."²³⁵ Speaking of an act of assembly purporting to validate certain proceedings in partition, which were void because one of the defendants had no notice of their pendency, the Supreme Court of Pennsylvania said: "The act itself is unconstitutional and void, as an infringement of the inhibition contained in the 9th section of the declaration of rights, article ix. of the constitution, that no person 'can be deprived of his life, liberty and property, unless by the judgment of his peers or the law of the land.' What is the act

²³³ 23 Wis. 367.

²³⁴ The legislature may change the burden of proof by enacting that proceedings theretofore taken in a court of special or limited jurisdiction shall be presumed, *prima facie*, to have been taken rightfully; and thus compel a person assailing such proceedings to show that the court never acquired jurisdiction. *Chandler v. Northrop*, 24 Barb. 129.

²³⁵ *Nelson v. Rountree*, 23 Wis. 370.

but a mere bald attempt to take the property of A and give it to B? It was not a case in which the mere irregularity of a judgment or a formal defect in the acknowledgment of a deed was cured, where the equity of the party is complete and all that is wanting is legal form. Such were *Underwood v. Lilly*,²⁹⁶ *Tate v. Stooltzfoos*,²⁹⁷ *Satterlee v. Matthewson*,²⁹⁸ and *Mercer v. Watson*.²⁹⁹ On the contrary, it is very clearly within the principle of *Norman v. Heist*,³⁰⁰ *Greenough v. Greenough*,³⁰¹ *De Chastellux v. Fairchild*,³⁰² *Bagg's Appeal*,³⁰³ *Shafer v. Eneu*,³⁰⁴ and *Shonk v. Brown*.³⁰⁵ These cases abundantly sustain the position that an act of the legislature can not take the property of one man and give it to another, and that when it has been attempted to be taken by a judicial proceeding, as a sheriff's sale, which is void for want of jurisdiction, it is not in the power of the legislature to infuse life into that which is dead—to give effect to a mere nullity. That would be essentially a judicial act—to usurp the province of the judiciary—to forestall or reverse their decision.³⁰⁶ Of course, the legislature can no more validate proceedings before a court or officer incompetent to entertain and decide them, than it can vivify judgments void for want of jurisdiction over the person of the defendant.³⁰⁷

SEC. 57. *Defects, other than Jurisdictional, which have been held Incurable.*—There are other defects, besides jurisdictional ones, on account of which void sales have been pronounced incurable. In Pennsylvania, an execution sale was void because made after the return day of the writ. Subsequently the legislature enacted that, "All sales of real estate made by sheriffs or coroners, after the return day

²⁹⁶ 10 S. & R. 97.²⁹⁷ 16 S. & R. 35.²⁹⁸ 16 S. & R. 191.²⁹⁹ 1 Watts, 330.³⁰⁰ 5 W. & S. 171.³⁰¹ 11 Pa. S. 489.³⁰² 15 Pa. S. 18.³⁰³ 43 Pa. S. 512.³⁰⁴ 54 Ib., 304.³⁰⁵ 61 Ib., 320.³⁰⁶ *Richards v. Rote*, 68 Pa. S. 255.³⁰⁷ *Denny v. Mattoon*, 2 Allen, 383; *State v. Doherty*, 60 Me. 504; *Pryor v. Downey*, 50 Cal. 389.

of their several writs of *levari facias*, *fieri facias*, *venditioni exponas*, or other writ of execution, shall not, on account of such irregularity in such proceedings, be set aside, invalidated, or in manner affected, and such sales so made shall be held as good and valid, to all intents and purposes, as if such sale had been made on or before the return-day of the writs respectively." The Supreme Court of the state, in deciding a case arising under this act, asked the questions: "Is this act constitutional? The sale being made contrary to legislative enactment, and declared by this court utterly void, can the legislature validate such a sale to the injury of another party? In plain English, can they take one man's property and give it to another—property which is secured to him by the constitution and laws?" It then answered the question as follows: "In this case, the purchaser bought in the face of a recent statute which he was bound to know and obey, and purchased with his eyes open. He has no moral claim to have the sale made good. 'The act of the legislature which covers this case is unconstitutional and void.'³⁰⁸ A sale void on account of fraud practiced by the purchasers can not be validated by the legislature. It does not come within the principle of that class of cases in which a legislature has been held to have the power to confirm by retroactive laws the acts of public officers, who have exceeded or imperfectly executed their authority.'³⁰⁹

SEC. 58. *Informalities may be Waived by Subsequent Curative Acts.*—Where a sale is void for some defect in the proceedings, not jurisdictional in its character, it may, in most states, be validated by subsequent curative act of the legislature.³¹⁰ Hence, acts have been adjudged to be constitutional which validated sales which were void because made

³⁰⁸ Dale v. Medcalf, 9 Pa. St. 110. See also Orton v. Noonan, 23 Wis. 102.

³⁰⁹ White M'ts R. R. v. White M'ts R. R., 50 N. H. 56.

³¹⁰ Lane v. Nelson, 79 Pa. St. 407; Boyce v. Sinclair, 3 Bush, 261; Beach v. Walker, 6 Conn. 197; Booth v. Booth, 7 Conn. 350; Wildes v. Vanvoorhis, 15 Gray, 139.

in violation of the appraisement laws,³¹¹ or based on defective levies or returns,³¹² or on charges of unlawful or excessive fees,³¹³ or made by an officer of another bailiwick from that in which the lands sold were situate.³¹⁴ In the opinion of Judge Cooley, "the rule applicable to cases of this description is substantially the following: If the thing wanting, or which failed to be done, and which constitutes the defect in the proceedings, is something, the necessity for which the legislature might have dispensed with by prior statute, then it is not beyond the power of the legislature to dispense with it by subsequent statute. And if the irregularity consists in doing some act, or in the mode or manner of doing some act, which the legislature might have made immaterial by prior law, it is equally competent to make the same immaterial by a subsequent law."³¹⁵ A partition sale was made to a company of persons, but the deed, by their consent, was made to one only, for convenience of selling and conveying. The deed was invalid because it did not follow the sale and order of confirmation. An act was subsequently passed providing that, on satisfactory proof being made to a court or jury that the lands were fairly sold, in good faith and for a sufficient consideration, the deed should be held valid. This act was held free from constitutional objections.³¹⁶ In Massachusetts, an act confirming deeds made by certain executors was

³¹¹ *Davis v. State Bank*, 7 Ind. 316; *Thornton v. McGrath*, 1 Duv. 349; *Boyce v. Sinclair*, 3 Bush, 261.

³¹² *Mather v. Chapman*, 6 Conn. 54; *Norton v. Pettibone*, 7 Conn. 319.

³¹³ *Booth v. Booth*, 7 Conn. 350.

³¹⁴ *Menges v. Wertman*, 1 Pa. St. 218, overruled; *Menges v. Dentler*, 33 Pa. St. 495.

³¹⁵ *Cooley's Const. Lim.* 371. Hence, deeds not executed in the mode prescribed by statute may be validated by a statute passed subsequent to their execution. *Watson v. Mercer*, 8 Pet. 88; *Chesnut v. Shane's Lessee*, 16 Oh. 599; *Newman v. Samuels*, 17 Ia. 528; *Shonk v. Brown*, 61 Pa. S. 327; *Dulany v. Tilghman*, 6 G. & J. 461; *Journey v. Gibson*, 56 Pa. S. 57; *Dentzel v. Waldie*, 30 Cal. 138. *Contra*, *Pearce v. Patton*, 7 B. Monr. 162; *Russell v. Rumsey*, 35 Ill. 362; *Ala. L. I. & T. Co. v. Boykin*, 38 Ala. 510.

³¹⁶ *Kearney v. Taylor*, 15 How. U. S. 494.

held valid, though they "had not previously been appointed and given bond in such a manner as to authorize them to execute the power of sale conferred by the will."³¹⁷ But, in this case, the heirs at law of the testator released all their interest in the lands at the time the executor's deed was executed. An extreme case is that of *Selsby v. Redlon*.³¹⁸ Justices' courts were authorized to issue executions at any time within two years after the entry of judgment. Nevertheless, under a misapprehension of the law, the practice prevailed, to a considerable extent, of issuing such writs at any time within five years. The legislature passed an act confirming and validating proceedings taken under writs issued more than two years after the entry of judgment. "Was it competent for the legislature, so far as the time of issuing was concerned, to enact that all executions upon judgments of justices of the peace theretofore issued after the expiration of two, but before the lapse of five years from the time the judgments were rendered, should be deemed valid and regular? It seems to me that it was, and that the act operated at once upon all such executions, the invalidity of which had not already been adjudged by some competent court of law or equity. I had occasion to examine the question, and some of the leading authorities upon it, in *Hasbrouck v. Milwaukee*,³¹⁹ and deem it unnecessary to add to what is there said. It appears to me, in the language of Chancellor Kent, to be one of those remedial statutes, not impairing contracts or disturbing absolute vested rights, but going only to confirm rights already existing, and in furtherance of the remedy, by curing defects and adding the means of enforcing existing obligations, the constitutionality of which has always been upheld. The validity of the judgment is not questioned, and the obligation of the debtor to pay not denied. After the execution was issued and the judgment satisfied, the question was,

³¹⁷ *Weed v. Donovan*, 114 Mass. 183.

³¹⁸ 19 Wis. 17.

³¹⁹ 13 Wis. 50.

whether such satisfaction should stand and the creditor retain what in justice and equity belonged to him, or whether he should make restoration to his debtor and be put to a new action to recover his debt. I think an act to relieve debtors in such cases to be not only just and reasonable, but that it is liable to no constitutional objection."³²⁰

SEC. 59. *Limitation on Effect of Curative Statutes.*—Even in those states where the validity of curative statutes is conceded, their operation is usually limited to the original parties. If a defendant whose property has been so irregularly sold under execution that his title is not divested, sell to a purchaser in good faith, and for value, the title of the latter is regarded as a vested right which can not be divested by a subsequent statute. The same rule usually prevails in regard to all legislation enacted for the purpose of confirming deeds which are invalid for some informality. The curative act does not operate against purchasers from the grantor in good faith, and for value, before its passage.³²¹ The operation of curative acts has also been denied where the proceedings had been, prior to the passage of the act, pronounced void by the judgment of a court of competent jurisdiction;³²² and, in Maine, curative acts do not operate to change the result of suits previously pending.³²³

SEC. 60. *General Reflections concerning Curative Statutes.*—It must, we suppose, be conceded that, prior to the adoption of the fourteenth amendment, there was no provision in the constitution of the United States which prohibited the state legislatures from enacting curative statutes validating prior judicial sales and proceedings. The provision of sec. 10, art. 1, forbidding states from passing *ex post facto* laws, applies exclusively to criminal matters and pro-

³²⁰ Selsby v. Redlon, 19 Wis. 21.

³²¹ Newman v. Samuels, 17 Ia. 528; Brinton v. Seevers, 12 Ia. 389; Thompson v. Morgan, 6 Minn. 292; Sherwood v. Fleming, 25 Tex. Supp. 408; Wright v. Hawkins, 28 Tex. 452; Menges v. Dentler, 33 Pa. St. 495, overruling Menges v. Wertman, 1 Pa. St. 218.

³²² Mayor v. Horn, 26 Md. 194.

³²³ Adams v. Palmer, 51 Me. 480.

ceedings, and does not inhibit retrospective legislation in civil matters.³²⁴ The same section also provides that no state shall pass any "law impairing the obligation of contracts." The word contracts is sufficiently comprehensive to embrace conveyances. Hence a state legislature can not annul or diminish the effect of a valid conveyance.³²⁵ But the federal constitution, while it prohibited the impairing of valid contracts, did not inhibit the validation of void contracts, nor the creation of obligations,³²⁶ nor did it prevent the state legislatures from divesting vested rights in any case where they could do so without impairing the obligation of some pre-existing contract.³²⁷ The fifth amendment to the constitution of the United States declares that "no person shall be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation." The prohibitions contained in this amendment are addressed to the federal legislature, and do not operate as limitations of the powers of any of the state legislatures.³²⁸ One of the guarantees contained in the fourteenth amendment is as follows: "Nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." This provision, in the language of Chief Justice Waite, speaking for the Supreme Court of the United States, "adds nothing to the rights of one citizen against another. It simply furnishes an additional guarantee against any encroachment by the states upon the funda-

³²⁴ Story on the Const., secs. 1345, 1398; *State v. Squires*, 26 Ia. 340; *Watson v. Mercer*, 8 Pet. 88; *Carpenter v. Pennsylvania*, 17 How. U. S. 456; Story on the Const., sec. 1398; *Calder v. Bull*, 3 Dall. 386.

³²⁵ Story on the Const., sec. 1376; *Fletcher v. Peck*, 6 Cranch, 137; *People v. Platt*, 17 Johns. 195; *Grogan v. San Francisco*, 18 Cal. 590; *Louisville v. University*, 15 B. Mon. 642.

³²⁶ Story on the Const., sec. 1398; *Satterlee v. Mathewson*, 2 Pet. 380.

³²⁷ Story on the Const., sec. 1398; *Satterlee v. Mathewson*, 2 Pet. 380; *Calder v. Bull*, 3 Dall. 386.

³²⁸ *Barron v. Mayor of Baltimore*, 7 Pet. 243; *Withers v. Buckley*, 20 How. U. S. 84.

mental rights which belong to every citizen as a member of society."³²⁹ But whether this amendment may in any case operate as a prohibition against curative laws passed by the states, is, perhaps, an immaterial inquiry, for the reason that most, if not all of the state constitutions contain limitations which, in substance, withhold the right to deprive any person of his property without due process of law.

Those curative acts which impart validity to judicial or execution sales otherwise void, necessarily result in the transfer of one person's property to another without the assent of the former. Before the passage of the act, property belonged to A. After its passage, the same property, without any act on the part of A or B, and solely through the operation of the curative statute, is vested in the latter. Such a statute can not be maintained on the ground that it is a judicial determination that the title of B is paramount to that of A, for the state constitutions prohibit the legislatures from exercising judicial functions. These constitutions also protect vested rights and prohibit the taking of property from one person and giving it to another, at least in all cases where there has been no resort to due process of law.³³⁰ But the words "property" and "vested rights," within the meaning of these constitutions, are difficult of definition. They seem not to refer to the legal title merely,—not to insure to a man that which at law belongs to him, but which in equity belongs to another. The most justifiable curative legislation is that which does no more than to give a legal sanction to a title which was theretofore good in equity.³³¹ So, it is said, legislatures

³²⁹ *United States v. Cruikshank*, 92 U. S. 542; 3 Cent. L. J. 295; 8 Ch. L. N. 233. See *City of Portland v. City of Bangor*, 65 Me. 120; 3 Cent. L. J. 651.

³³⁰ *Cooley's Const. Lim.*, chap. xi. To ascertain the meaning of "due process of law," and of equivalent terms, see *ib.*; *Kennard v. Louisiana*, 8 Ch. L. N. 329; 92 U. S. 480; *Walker v. Sauvinet*, 3 Cent. L. J. 445; 92 U. S. 90; *Murray v. Hoboken L. & I. Co.*, 18 How. U. S. 272; *Story on the Const.*, sec. 1944.

³³¹ *Chesnut v. Shane*, 16 Oh. 599.

may transmute a moral into a legal obligation;³³² and that "a party has no vested right in a defense based upon an informality not affecting his substantial equities;"³³³ that "courts do not regard rights as vested contrary to the justice and equity of the case;"³³⁴ that "a party can not have a vested right to do a wrong;"³³⁵ that "the rules which determine the legislative power in such cases are broad rules of right and justice."³³⁶ So, after all, the limitation inserted in the fundamental laws are so construed that their application depends, not on settled principles, but upon notions of right and justice. A man's title may be perfect at law. It may also be unassailable in equity. He has, nevertheless, no vested right in it which he may hold paramount to legislative control, unless, in addition to his perfect title at law and in equity, his title also meets the approval of the judge before whom it is questioned; the latter, in withholding or granting such approval, being governed by certain rules of right and justice existing in his own conscience, but not susceptible of that accurate description which would enable us to recognize them in the future, and rely on them for our protection and guidance. Such, at least, seems to be the result of the weight of the authorities.

With respect to curative acts affecting judicial and execution sales, two rules are commonly put forth as tests of their constitutionality. The first is, that what the legislature could have dispensed with before the sale, it may dispense with afterwards;³³⁷ and the second is that courts do not regard rights as vested contrary to the justice and equity of the case, but will determine the legislative power on broad rules of right and justice. Neither rule has been universally accepted and followed. Thus, though a statute may unquestionably authorize property to be sold for taxes, with-

³³² *Weister v. Hade*, 52 Pa. St. 480.

³³³ *Cooley's Const. Lim.* 370.

³³⁴ *State v. Newark*, 3 Dutch. 197.

³³⁵ *Foster v. Essex Bank*, 16 Mass. 245.

³³⁶ *Story on the Const.*, sec. 1958, by Cooley.

³³⁷ *Cooley's Const. Lim.* 371.

out the aid of any judicial proceedings whatever, yet where such proceedings were required and were so prosecuted as to be void for want of jurisdiction over the defendant, it was held that they could not be made valid by subsequent legislation.³³⁸ So, while legislatures may authorize guardians and others to sell property belonging to persons not *sui juris*, without applying to court for authority so to do, yet where such applications are required to be made to some court, and the proceedings of such court are void for want of jurisdiction, they can not be subsequently made valid.³³⁹ If the rights of one whose property has been sold at a void sale are not to be regarded as vested except when, "upon broad rules of right and justice," they should be so regarded, then the distinction between jurisdictional and other defects is immaterial. For it may be, and frequently is, as unjust to urge a jurisdictional defect, as it is to urge some other irregularity, such, for instance, as the omission to give notice of the sale. In the first case, the sale may have been fair, a good price realized, and the proceeds applied to pay the debts of the defendant; while, in the second case, the property may have been sacrificed for want of the notice of the sale. If void judicial or execution sales may be made valid, it would seem to be on the ground that the purchaser, by the payment of the money and its application to the benefit of the defendant, obtained an equity which the legislature might recognize and transform into a legal title;³⁴⁰ that, in such a case, the person whose property was sold has left to him, after the sale and conveyance, a mere technical and unconscionable defense; and that, in such a defense, there can be no vested right. But this view of the question is not invariably correct nor necessarily conclusive. In the first place, everybody is conclusively presumed to be acquainted with the law. It can not, therefore, be expected that a sale, made in such a manner as to be inoperative under

³³⁸ Nelson v. Rountree, 23 Wis. 367.

³³⁹ See sec. 56.

³⁴⁰ Thornton v. McGrath, 1 Duv. 355.

the then existing law, will realize a fair price. Many persons must be deterred from bidding, because they know or suspect that the sale is invalid. He who purchases must be taken to act with his eyes open, and as bidding for a mere chance rather than for an unquestionable title. All this is equally true, whether the defect be that the judgment is void, or that the sale is invalid from some other vice. He whose property is sacrificed against his will, by being exposed to the hazard of a void sale, has, even in the broad rules of right and justice, rights as sacred as those of the speculating purchaser. The latter is a mere volunteer, risking his money in defiance of the law. He is not imposed on in any manner, nor is there any contract between him and the owner of the property to urge by way of estoppel. But if an execution or judicial sale be void at law, it is usually equally void in equity. The purchaser has no title which is recognized in any prevailing system of law. The judgment-debtor is under no obligation which will warrant any court in compelling him to convey or surrender his property to the purchaser. Why should not those rights which confer a perfect title to property, both at law and in equity, be held to be vested rights? If such rights are not vested, then what additional claim to protection must the owner of property have, before his rights become vested? Must he have a moral right or title? and, if so, what does the word moral mean in this connection? Has it some definite signification? or must it, for all the practical purposes of litigation, vary so as to correspond with the moral perceptions of the different judges? In pronouncing the opinion of the Supreme Court of California, in an action wherein an heir had sued to recover his inheritance, Mr. Justice McKinstry very forcibly, said: "As to any vague, indeterminate and indeterminable 'moral equity,' if any such exist, it may well be doubted whether we can recognize such, since the courts have no standard by which to estimate its sufficiency or effectiveness. Even if we could adopt, however, the measure of rights suggested by some-

of the cases, we are not prepared to hold that the plaintiff in this action may not insist upon his complete legal and equitable title, without violating any principle of morality.³⁴¹ Admitting that the estate of the ancestor comes to the heir burdened with the debts of the former, it is still the right of the latter, when courts are organized or are required by the constitution to be organized for the settlement of the estates of decedents, to have the debts ascertained and the property applied by a tribunal of competent jurisdiction. And, upon any theory, the doctrine of estoppel, which is claimed to impose an imperfect duty capable of being ripened into a perfect obligation by the legislative will, can have no application, unless a party, by his own contract or other voluntary act, has placed himself in such an attitude that it would be a violation of sound morality on his part for him to adhere to and insist on his legal and equitable rights. It ought not to be made to apply to this plaintiff merely because he was a party, as an infant, to a pretended legal proceeding."³⁴²

³⁴¹ 9 Gill, 299.

³⁴² Pryor v. Downey, 50 Cal. 403.

CHAPTER VII.

CONSTITUTIONALITY OF SPECIAL STATUTES AUTHORIZING INVOLUNTARY SALES.

- SECTION 61. General Nature of Legislative Sales and of the Statutes under which they are made.
- SEC. 62. Of the Power of the Legislature to Provide for the Involuntary Sale of Property.
- SEC. 63. The Constitutionality of Special Laws Authorizing Sale of Property Denied.
- SEC. 64. The Constitutionality of Special Laws Authorizing Sale of Property Sustained.
- SEC. 65. Acts Authorizing Sales by Administrators, Constitutionality Affirmed.
- SEC. 66. On whom Power of Sale may be Conferred by Special Acts.
- SEC. 67. Of Special Acts Authorizing the Sale of Lands to pay Debts.
- SEC. 68. Special Act need not Require a Bond for the Application of the Proceeds.
- SEC. 69. Acts Authorizing the Sale of the Lands of Co-tenants.
- SEC. 70. Decisions Limiting the Power of Legislatures to pass Special Laws for the Sale of Property.

SEC. 61. *General Nature of Legislative Sales and the Special Acts under which they are Made.*—A question very closely allied with judicial sales, is that of involuntary sales made by authority of the legislature, without the assent of the owner of the property, and in the absence of any judicial declaration concerning the necessity or propriety of the sale. Many special statutes have been enacted purporting to confer authority on guardians, administrators, trustees and other persons to sell and convey the estates of their wards or of minor heirs, or of *cestuis que trust*. Sometimes entire strangers have been appointed as commissioners, and invested with powers of sale. Generally, in statutes of this character, the legislature assumes the existence of a state of facts, making a sale either necessary or expedient; and, therefore,

empowers some one to make a sale, either according to his discretion, or in the manner and under the circumstances designated in the special statute. Frequently bonds are exacted for the purpose of avoiding the misappropriation of the funds to be realized. Often a report of the sale is required to be made to some judicial tribunal. The functions of this tribunal are usually restricted to enquiring and determining whether the sale has been conducted in conformity with the special act. Whether the sale be required to be *confirmed* by some court or not, it is evident that the authority for selling is purely legislative. This class of sales may, therefore, be styled "legislative sales."

SEC. 62. *Of the Power of the Legislature to provide for the Involuntary Sale of Property.*—There can be no question of the authority of the legislature, by general laws, and in proper cases, to authorize the compulsory alienation of real and personal property. The power of the English Parliament is absolute. It can regulate the succession to the crown, or alter the established religion of the land. Theoretically, at least, it has uncontrovertible dominion over both persons and property. Hence, it is no cause for wonder that "private acts of parliament" are recognized as among the "assurances by matter of record." In this country, however, the legislature of every state possesses an authority much more restricted than that of Parliament. In none of our courts would a statute purporting to take property from one person and vest it in another, be treated with any respect. The constitutions of most, and perhaps of all of our states vest the legislative and the judicial functions of government in separate tribunals, and forbid either tribunal from encroaching upon the jurisdiction of the other. Hence, a statute professing to determine the conflicting claims of title would be as inoperative as a statute directly transferring title from one person to another. But every legislature possesses powers under which it may enforce the collection of debts, provide for the management of the property of persons incapable of caring for themselves, and

also for the partition of estates held in co-tenancy. The exercise of these powers often involves the compulsory sale of property. Before a debt can be collected by legal compulsion, its existence must be determined. This determination can be made only by some *judicial* authority. Hence, a statute declaring that A is indebted to B, or that the lands of A shall be sold to pay the debts owing from him to B, is unquestionably void, unless the legislature enacting it was competent to exercise judicial functions, or the existence of the debt from A to B is settled by some judicial tribunal. So, if A should die, his heirs would unquestionably succeed to his estate, subject to the right of his creditors to enforce their claims against the estate; and also subject, in case of the minority or other incapacity of the heirs, to the power of the government to make the estate contribute to their education or support. But the existence of debts against A could, during his lifetime, be established only by judicial inquiry. Does this inquiry become any less judicial or any more legislative in its nature by reason of A's death? So, in the event that the minor or other heirs of A are alleged to be in circumstances in which the sale of their estate is either essential to their support or highly beneficial to their interests, the truth of the allegation ought to be determined in some manner; and this determination, if it does not invariably call for the exercise of judicial functions, can unquestionably be most satisfactorily accomplished through their aid. Hence, the compulsory sale of property is usually governed by general laws, under which the necessity and expediency of the sale are made the subject of judicial inquiry, and the authority to proceed depends upon the judgment or order of some judge or court. Any departure from these general laws is fraught with great danger, and is likely to result in inconsiderate action, if not in unmitigated plunder. Hence, in nearly one-half of the states of this Union, constitutional provisions directly inhibit special laws licensing the sale of the lands of minors and other persons under legal disability.³⁴⁸

³⁴⁸ Cooley's Const. Lim., 3d ed., p. 107, note.

SEC. 63. *The Constitutionality of Special Laws for the Sale of Property Denied.*—In those states whose constitutions do not directly forbid the enactment of special laws authorizing one person to sell the property of another, such laws have, when drawn in question before the courts, been assailed: 1st, as contravening the spirit of constitutional provisions requiring all laws of a general nature to have a uniform operation; 2d, as in opposition to that provision of the Constitution of the United States, which is also incorporated in most of the state constitutions, that no person shall be deprived of life, liberty or property without due process of law;³⁴⁴ and, 3d, as involving the exercise of judicial functions not possessed by the legislature.

The House of Representatives of the State of New Hampshire, in June, 1827, asked the judges of the Supreme Court of judicature of that state the following question: "Can the legislature authorize a guardian of minors, by a special act or resolve, to make a valid conveyance of the real estate of his wards?" The judges answered as follows: "The objection to the exercise of such a power by the legislature, is, that it is in its nature both legislative and judicial. It is the province of the legislature to prescribe the rule of law; but, to apply it to particular cases, is the business of the courts of law. And the thirty-eighth article in the bill of rights declares that, 'in the government of this state, the three essential powers thereof, to wit., the legislative, executive and judicial, ought to be kept as separate from, and independent of each other as the nature of a free government will admit, or as is consistent with that chain of connection that binds the whole fabric of the constitution in one indissoluble bond of union and amity.' The exercise of such a power by the legislature can never be necessary. By the existing laws, judges of probate have very extensive

³⁴⁴ This provision may be found in both the fifth and the fourteenth amendments to the Constitution of the United States. As employed in the former, it is a limitation on the powers of the General Government only. In the latter amendment, it is designed as a limitation on the powers of the states. See citations numbers 328 and 329.

jurisdiction to license the sale of the real estate of minors by their guardians. If the jurisdiction of the judges of probate be not sufficiently extensive to reach all proper cases, it may be a good reason why that jurisdiction should be extended, but can hardly be deemed a sufficient reason for the particular interposition of the legislature in an individual case. If there be a defect in the laws, they should be amended. Under our institutions all men are viewed as equal, entitled to enjoy equal privileges, and to be governed by equal laws. If it be fit and proper that license should be given to one guardian, under particular circumstances, to sell the estate of his ward, it is fit and proper that all other guardians should, under similar circumstances, have the same license. This is the very genius and spirit of our institutions. And we are of opinion that a particular act of the legislature to authorize the sale of the land of a particular minor, by his guardian, can not be easily reconciled with the spirit of the article in the bill of rights just cited.

“It is true that the grant of such a license by the legislature to the guardian is intended as a privilege and benefit to the ward. But, by the law of the land, no minor is capable of assenting to a sale of his real estate in such a manner as to bind himself. And no guardian is permitted, by the same law, to determine when the estate of his ward ought, and when it ought not to be sold. In the contemplation of the law, the one has not sufficient discretion to judge of the propriety and expediency of the sale of his estate, and the other is not to be intrusted with the power of judging. Such being the general law of the land, it is presumed that the legislature would be unwilling to rest the justification of an act authorizing the sale of a minor's estate upon any assent which the guardian or the minor could give to the proceeding.

“The question, then, is, as it seems to us, can a ward be deprived of his inheritance, without his consent, by an act of the legislature, which is intended to apply to no other individual? The fifteenth article in the bill of rights de-

clares that, no subject shall be deprived of his property 'but by judgment of his peers or the law of the land.' Can an act of the legislature, intended to authorize one man to sell the land of another without his consent, be 'the law of the land,' within the meaning of the constitution? Can it be 'the law of the land' in a free country? If the question proposed to us can be resolved into these questions, as it appears to us it may, we feel entirely confident that the representatives of the people of this state will agree with us in the opinion we feel ourselves bound to express on the question submitted to us:—That the legislature can not authorize the guardian of minors, by a special act or resolve, to make a valid conveyance of the real estate of his wards.'³⁴⁵

The Supreme Court of the State of Tennessee, in the year 1836, delivered an opinion in full accord with that of the judges of New Hampshire. In 1825 the legislature of the first named state passed an act authorizing the guardians of certain minors therein specified to sell certain lands in the best manner they could, and declaring that the assets to be produced by such sale should be assets for the payment of the debts of the ancestor of the minors. Under this act a sale was made. Some years afterwards a bill was brought by the minors against the grantee of the purchaser, to recover possession of the lands sold and also for an accounting for the rents and profits. The legislative sale was adjudged void, because it deprived the minors of their property without due process of law, and because the act purporting to authorize it was a usurpation of the authority of the judiciary.³⁴⁶

SEC. 64. *The Constitutionality of Special Laws authorizing Sales Sustained.*—Notwithstanding the decisive stand taken by the courts of New Hampshire and Tennessee against special statutes authorizing sales by guardians, such statutes have been sustained in other states so frequently,

³⁴⁵ Opinion of the Judges, 4 N. H. 572.

³⁴⁶ Jones v. Perry, 10 Yerg. 59.

and in such varying circumstances, that their constitutionality is now almost free from doubt. In 1792, Asaph Rice, by a resolve of the general court of the commonwealth of Massachusetts, was authorized to sell and convey certain real estate of which he was tenant by courtesy, and of which his children were seized in fee of the remainder expectant on the death of their father. A sale was made by virtue of the authority conferred by this resolve. After the death of the father, the children, by a writ of entry, sought to recover their inheritance. Parker, C. J., delivered the opinion of the court, in the course of which he said: "If the power by which the resolve authorizing the sale in this case was passed were of a judicial nature, it would be very clear that it could not have been exercised by the legislature without violating an express provision of the constitution. But it does not seem to us to be of this description of power; for it was not a case of a controversy between party and party; nor is there any decree or judgment affecting the title to property. The only object of the authority granted by the legislature was to transmute real into personal estate, for purposes beneficial to all who were interested therein. This is a power frequently exercised by the legislature of this state, since the adoption of the constitution, and by the legislatures of the province and of the colony while under the sovereignty of Great Britain, analogous to the power exercised by the British Parliament, time out of mind. Indeed, it seems absolutely necessary for the interest of those who, by the general rules of law, are incapacitated from disposing of their property, that a power should exist somewhere to convert lands into money. For otherwise, minors might suffer, although having property, it not being in a condition to yield an income. This power must rest in the legislature of this commonwealth, that body being alone competent to act as the general guardian and protector of those who are disabled to act for themselves. It was undoubtedly wise to delegate the authority to other bodies,

whose sessions are regular and constant, and whose structure may enable them more easily to understand the merits of the particular applications brought before them. But it does not follow that, because the power has been delegated by the legislature to courts of law, it is judicial in its character. For aught we see, the same authority might have been given to the selectmen of each town, or to the clerks or registers of the counties, it being a mere ministerial act, certainly requiring discretion, and sometimes knowledge of the law for its due exercise, but still partaking in no degree of the characteristic of judicial power. No one imagines that, under this general authority the legislature could deprive a citizen of his estate, or impair any valuable contract in which he might be interested. But there seems to be no reason to doubt that, upon his application, or the application of those who properly represent him, if disabled from acting himself, a beneficial change of his estate, or a sale of it for purposes necessary and convenient for the lawful owner, is a just and proper subject for the exercise of that authority. It is, in fact, protecting him in his property, which the legislature is bound to do, and enabling him to derive subsistence, comfort and education from property which might otherwise be wholly useless during that period of life when it might be most beneficially enjoyed.³⁴⁷ If it be conceded that an infant, lunatic or other person incompetent to act for himself, is in need of ready money for his sustenance, or for any other pressing necessity, of course the conversion of his estate into money would be authorized by any tribunal having competent authority. Legislative licenses authorizing a sale under such circumstances are generally sustained.³⁴⁸ Nor is any necessity required to support the exercise of this legislative authority. It seems to be sufficient that the sale is one to which the incompetent person might, if *sui juris*, probably give his assent. Hence, a special statute may be supported

³⁴⁷ Rice v. Parkman, 16 Mass. 329.

³⁴⁸ Stewart v. Griffith, 33 Mo. 23.

if, without any apparent necessity, it sanctions the conversion of real into personal estate. This conversion is presumed to be beneficial to the minor, or, at least, not to be a destruction of his rights of property.³⁴⁹ Acts have been sustained which authorized guardians to convey lands sold by the ancestor of their wards;³⁵⁰ or which empowered the guardian of a lunatic to sell the lands of the latter to pay off an incumbrance thereon;³⁵¹ or which authorized guardians to convey real estate for the purpose of effecting a compromise with persons claiming adversely to the minors.³⁵² The case last cited determined the constitutionality of an act passed by the legislature of Missouri in the year 1847. This act recited that certain adverse claims existed to a tract of land in the City of St. Louis; that the parties in interest had agreed upon a compromise, to accomplish which, mutual deeds of quit-claim were essential; and then the act authorized the guardians of designated minors to execute the conveyances necessary to consummate the compromise. Such a conveyance was executed, and was upheld, though it was subsequently ascertained that the minor's title was valid and that of the adverse claimants unfounded,—the court saying: “It is a question of power, and whilst it is conceded that the legislature has no power to transfer A's property to B, or to authorize any one else to do so—supposing A and B to be adults and competent to transact their own affairs—the legislature may authorize the guardian, father or mother of a lunatic, infant or idiot, to transfer the estate of the minor, lunatic, or idiot. It will be observed that the title of Pelagie, and her daughter Antoinette, was a disputed one. That the claimants under Mackay and Rut-

³⁴⁹ *Carroll v. Olmstead*, 16 Oh. 251; *Dorsey v. Gilbert*, 11 G. & J. 87; *Davis v. Helbig*, 27 Md. 452; *Thurston v. Thurston*, 6 R. I. 296; *Snowhill v. Snowhill*, 3 N. J. Eq. 20; *Brenham v. Davidson*, 51 Cal. 352; *Sohier v. Mass. Gen'l Hospital*, 3 Cush. 483; *Norris v. Clymer*, 2 Pa. St. 284; *Clarke v. Van Surlay*, 15 Wend. 436.

³⁵⁰ *Estep v. Hutchman*, 14 S. & R. 435.

³⁵¹ *Davison v. Jonhonnot*, 7 Met. 388.

³⁵² *Thomas v. Pullis*, 56 Mo. 217.

gers, really had no valid title, is not important. This was ascertained after the decision of this court, in the case of *Norcum v. D'Oench*, but it was a matter of conjecture before. The adults had an undoubted right to compromise. If the legislature has power to authorize third persons, guardians, fathers, mothers, etc., to convey the undisputed title of an infant, without regard to insuring the proceeds for the benefit of the infant, why should they be deprived of the right to authorize the compromise of an unsettled claim?" ³⁵³

SEC. 65. *Acts authorizing Sales by Administrators; Constitutionality of, Affirmed.*—The cases cited in the preceding section affirmed the constitutionality of laws authorizing sales to be made by the guardians or parents of persons incapable of acting for themselves. We shall now refer to cases involving the legislative delegation of a like authority to administrators. The weight of the authorities is to the effect that the power may be conferred on an administrator as well as on a parent or guardian.³⁵⁴ In considering the validity of a sale made under an act of this character, the Supreme Court of the United States said: "On principle, this process is sustainable. On the death of the ancestor, the land owned by him descends to his heirs. But how do they hold it? They hold it subject to the payment of the debts of the ancestor, in those states where it is liable to such debts. The heirs cannot alien the lands to the prejudice of the creditors. In fact and in law, they have no right to the real estate of their ancestors, except that of possession, until the debts shall be paid. As it regards the question of power in the legislature, no objection is perceived to their subjecting the lands of the deceased to the payment of his debts, to the exclusion of his personal property. The legislature regulates descents and the con-

³⁵³ *Thomas v. Pullis*, 56 Mo. 217.

³⁵⁴ *Doe v. Douglas*, 8 Blackf. 10; *Kibby v. Chitwood*, 4 Monr. 91; *Williamson v. Williamson*, 3 S. & M. 715, 745; *Gannett v. Leonard*, 47 Mo. 205; *Holman's Heirs v. Bank of Norfolk*, 12 Ala. 369, 415.

veyance of real estate. To define the rights of debtor and creditor, is their common duty. The whole range of remedies lies within their province. They may authorize a guardian to convey the lands of an infant; and indeed they may give capacity to the infant himself to convey them. The idea that the lands of an infant which have descended to him can not be made responsible for the payment of the debts of the ancestor, except through a decree of a court of chancery, is novel and unfounded. So far from this being the case, no doubt is entertained that the legislature of a state have the power to subject the lands of a deceased person to execution in the same manner as if he were living. The mode in which this shall be done is a question of policy, and rests in the discretion of the legislature. The law under which the lot in dispute was sold decides no fact binding on creditors or heirs. If the administratrix and Brown have acted fraudulently in procuring the passage of this act, or in the sale under it, relief may be given on that ground. But the act does nothing more than provide a remedy, which is strictly within the power of the legislature.³⁵⁵

SEC. 66. *On whom Power of Sale may be Conferred by Special Acts.*—It does not appear to be necessary that the person authorized by a special act of the legislature to sell the property of another, should be an administrator or guardian by regular appointment of the courts of the state where the sale is to be made, nor indeed that he should have any official character whatever, nor that he should be a relative of the person for whom he is authorized to act. His authority rests on the special act, and not on his other relations with the incompetent person. The legislature of the state wherein the land lies may authorize its sale and conveyance by an administrator residing and appointed in another state or by her attorneys.³⁵⁶ In Kentucky, an act was sustained which, after reciting that no one would ad-

³⁵⁵ *Watkins v. Holman*, 16 Pet. 62.

³⁵⁶ *Holman's Heirs v. Bank of Norfolk*, 12 Ala. 369, 415; *Watkins v. Holman*, 16 Pet. 25; *Boon v. Bowers*, 30 Miss. 246.

minister of the estate of a deceased person, appointed three commissioners with power to sell so much of such estate as would be necessary to pay his debts.³⁵⁷ An act of the legislature of California, approved May 6, 1861, purported to authorize Mary Ann Paty Daley, the mother and guardian of Francis William Paty, a minor, to sell any or all of his real estate. In November, prior to the passage of this act, Mrs. Daley had been appointed guardian of her son by the probate judge of Plymouth County, in the State of Massachusetts. In May, 1856, she received a like appointment from the chief justice of the Hawaiian Islands. She was never appointed guardian in California. She made sales and conveyances under this act. These sales were declared void, not on the ground that the statute was unconstitutional, but because she had never been appointed guardian in California. "The statute," said the court, "does not purport, in any part of it, to nominate Martha Ann Paty Daley guardian of the infant; it simply assumes that she is, or—when the sale shall be made—will be guardian of his estate; exercising the ordinary functions, and charged with the ordinary responsibilities of guardians. The power was given to her in her capacity as guardian, and not as an individual; as she failed to secure an appointment as guardian, the attempted sale was void."³⁵⁸ Frequently property is vested in trustees for the benefit of persons incapable of acting for themselves. When this is the case, the legislature may authorize sales and conveyances to the same extent as when property is in the hands of administrators or guardians. In 1802, Mary Clark devised certain lands to Benjamin Moore, and two other persons, in trust: 1st. To receive the rents, issues and profits thereof, and pay the same to Thomas B. Clarke during his life; 2d. After the death of Thomas B. Clarke, to convey the premises to his lawful issue in fee; 3d. If he should not have lawful issue, then to convey the premises to Clement C. Moore. In 1814,

³⁵⁷ *Shehan's Heirs v. Barnett's*, 6 Monr. 593.

³⁵⁸ *Paty v. Smith*, 50 Cal. 159.

the legislature, upon the petition of Thomas B. Clarke, and with the concurrence of the trustees named in the will, and of Moore, the contingent remainder-man, passed an act authorizing the sale of a portion of the real estate for the purpose of *creating an income* for the benefit and support of Thomas B. Clarke, his family and children; the principal, after his death, to be paid according to the trusts in the will of Mary Clarke. In 1815, a further act was passed reciting that Moore, the contingent remainder-man, had conveyed his interest to Thomas B. Clarke, and “authorizing Clarke to do and perform every act in relation to the property which the act of 1814 had directed might be performed by trustees to be appointed by the chancellor; but no sale was to be made by Clarke until he procured the assent of the chancellor; and when a sale was made, the proceeds were to be invested, and an annual account of the *principal* rendered, but the *interest* Clarke was authorized to apply to *his own use and benefit, and for the maintenance and education of his children.*” Sales were made under these acts. The constitutionality of these acts was discussed in the highest courts of the state and of the nation, and was always sustained. It was held, 1st, that it was competent for the legislature to change the trustees appointed by the will of Mrs. Clarke, and to vest their powers in Thomas B. Clarke; 2d, that it was equally within the power of the legislature to provide for the sale of the interest of the children of Clarke, in order that they might at once have the benefit of the estate for their better support and education during the most helpless period of their lives.³⁵⁹ The litigation arising under the will of Mrs. Clarke and these special acts of the legislature was carried on, in various courts and forms, during nearly half a century; and has occasioned the most exhaustive discussions, both of the power of the legislatures, by special acts, to authorize the sale of the property of persons incapable of acting for themselves, and of the nature

³⁵⁹ Clarke v. Van Surley, 15 Wend. 436; Leggett v. Hunter, 19 N. Y. 445.

and effect of such sales when conducted under the supervision of judicial authority.³⁶⁰ The power which is competent to change trustees and provide for the sale of property in which infants are interested, can deal with like efficiency with property given for the purposes of charity;³⁶¹ or which is vested in trustees, or other persons, for the benefit of persons not *in esse*.³⁶²

SEC. 67. *Of Special Acts authorizing the Sale of Lands to Pay Debts.*—As the estate of an ancestor descends to his heirs subject to the right of the creditors of the former to compel such estate to contribute to the payment of their claims, a special act to authorize the sale of property for the payment of such claims seems to be one of the most defensible acts of special legislation; and so it is, if the validity and existence of the claims be conceded. But special acts to raise funds for the payment of debts have been more persistently and plausibly assailed than acts for any other purpose short of ostensible confiscation. If such an act is so expressed as to preclude the parties in interest from disputing the validity of the debts, it is unquestionably void, because it is a usurpation of judicial authority. In 1827, the Legislature of Illinois, by a special act, authorized John Lane to sell so much of the lands of the late Christopher Robinson, deceased, as should prove sufficient to raise the sum of \$1,008.87, and interest and cost of sale. The proceeds of the sale were to be applied to the extinguishment of the claims of said Lane and one John Brown for moneys advanced and liabilities incurred on account of Robinson's estate. This act was held to be clearly beyond the authority of the legislature, because the existence

³⁶⁰ *Clarke v. Van Surlay*, 15 Wend. 436; *Sinclair v. Jackson*, 8 Cowen, 543; *Cochran v. Van Surlay*, 20 Wend. 365; *Williamson v. Berry*, 8 How. U. S. 495; *Towle v. Forney*, 14 N. Y. 423; *Williamson v. I. P. Congregation*, 8 How. U. S. 565; *Suydam v. Williamson*, 24 How. U. S. 427; *Williamson v. Ball*, 8 How. U. S. 566; *Williamson v. Suydam*, 6 Wall, 723.

³⁶¹ *Matter of Trustees N. Y. P. E. Pub. School*, 31 N. Y. 592.

³⁶² *Matter of Bull*, 45 Barb. 334; *Leggett v. Hunter*, 19 N. Y. 445.

of the indebtedness from Robinson's estate to Brown and Lane, and the consequent right of Brown and Lane to satisfaction out of the proceeds of the estate, could only be ascertained as the result of a judicial investigation, which the legislature was incompetent to conduct. The act was also thought to contravene the constitutional provision, that "no freeman shall be disseized of his freehold, but by the judgment of his peers, or the law of the land."³⁶³ The Supreme Court of Illinois has now taken a position far in advance of that assumed in the case just cited, and will not tolerate any special legislation authorizing the conveyance of real estate to pay debts, unless such debts have first been judicially established. In 1823, the legislature of that state authorized John Rice Jones, administrator of Thomas Brady, deceased, to sell and convey lands, the proceeds to be assets in the hands of the administrator, to be appropriated to the payment of the debts of the deceased, and the balance, if any, to be distributed between his children. Of this act, and a sale made by its authority, the court said: "When the act in question was passed, and when the land was sold, the title was in the heirs of Brady, subject to be divested, if necessary, for the payment of his debts. But the legislature had no more right or power to assume that he died owing debts, and, on that assumption, to authorize his administrator to sell lands vested in his heirs, for the purpose of holding the proceeds as assets, without any judicial inquiry as to the existence of such debts before executing the power, than it would have had, in his lifetime, the right or power to authorize the sheriff of the county where he lived to sell his land, and hold the proceeds for the payment of whatever debts he might owe."³⁶⁴ The conclusion here announced is one which, upon principle, meets our full concurrence. But we understand the decided preponderance of the authorities to be in favor of sustaining special acts

³⁶³ Lane v. Dorman, 3 Scam. 238, followed in Dubois v. McLean, 4 McLean, 486.

³⁶⁴ Rozier v. Fagan, 46 Ill. 405; Davenport v. Young, 16 Ill. 548.

authorizing sales for the payment of the debts of the deceased owner of property, even in advance of the judicial ascertainment of such debts, provided the act leaves the existence of such debts open to inquiry.³⁶⁵

SEC. 68. *Special Act need not require a Bond for the Application of the Proceeds.*—Special acts, authorizing the sale by one person of the property of another, generally contain precautionary provisions tending to secure the honest exercise of the authority conferred. Bonds are usually exacted, conditioned for the proper appropriation of the proceeds of the sale. By this means, the interests of heirs and creditors are exempted from needless peril. These precautions seem not to be essential to the validity of the act. The question is one of power. The existence of the power being established, the propriety of its exercise rests solely with the legislature. If, through misplaced confidence or reckless inattention to the duties of its trust, the legislature confers the power of sale on a person who, being required to furnish no security, squanders the proceeds of the sale, and thus defrauds the heirs of their inheritance and the creditors of their means of enforcing payment, the sale is not, on that account, invalid.³⁶⁶

SEC. 69. *Acts for the Sale of the Lands of Co-tenants.*—The power of the legislature to authorize, by general laws, the sale of the lands of co-tenants for the purposes of partition, where the necessity of the sale is judicially determined, is unquestionable.³⁶⁷ So, there is little or no doubt of the constitutionality of a special act authorizing a co-tenant to petition a court of competent jurisdiction for the sale of the lands of a co-tenancy, and also authorizing the court, upon being satisfied that a division of the property among the co-tenants is extremely difficult, if not impracticable, to

³⁶⁵ *Watkins v. Holman*, 16 Pet. 25; *Davison v. Johonnot*, 7 Met. 388; *Shehan's Heirs v. Barnett's*, 6 Monr. 593; *Holman's Heirs v. Bank of Norfolk*, 12 Ala. 369; *Kibby v. Chitwood*, 4 Monr. 91; *Williamson v. Williamson*, 3 S. & M. 715, 745.

³⁶⁶ *Gannett v. Leonard*, 47 Mo. 205; *Thomas v. Pullis*, 56 Mo. 218.

³⁶⁷ *Freeman on Co-Tenancy and Partition*, 540.

order a sale of the premises and a division of the proceeds among the parties in interest.³⁶⁸ Such an act leaves the necessity and expediency of the sale to be determined by the judiciary. Special acts which do this are free from constitutional objections, except in those states whose constitutions forbid special legislation.³⁶⁹ In Pennsylvania, an act was sustained which empowered one of several heirs, without the aid of any judicial proceedings, to sell the lands descended from their common ancestor and divide the proceeds among the co-heirs;³⁷⁰ and a decision, similar in spirit, has been made in Massachusetts.³⁷¹

SEC. 70. *Decisions limiting the Power of Legislatures to pass Special Laws for the Sale of Property.*—We shall now call attention to decisions which, though pronounced by courts which concede the power of a legislature to pass special acts authorizing the sale of property, prescribe limits beyond which the power is not recognized. In 1831, Thomas Poole devised his real estate to his executors in trust: 1st, to permit his daughter, Eliza, to occupy the same and take the rents and profits thereof during her natural life; 2d, upon her death, the lands were to vest in her lawful issue, and, in default of such issue, then in all the testator's surviving grand-children. By special acts, passed in 1837 and 1849, the executors were authorized to sell and convey the real estate, and, with the proceeds, to pay all charges and assessments against the land, and also the costs of sales and commissions. The surplus was then to be disposed of in the manner specified in the will for the disposition of the real estate. A sale was made under these acts. A case was then agreed upon and submitted, for the purpose of ascertaining whether the purchaser could acquire a valid title. It appeared that the daughter, Eliza, was still living, and that she had two children. The act was held unconstitu-

³⁶⁸ *Edwards v. Pope*, 3 Scam. 465.

³⁶⁹ *Florentine v. Barton*, 2 Wall. 210.

³⁷⁰ *Fullerton v. McArthur*, 1 Grant's Ca. 232.

³⁷¹ *Soheir v. Mass. Genl. Hospital*, 3 Cush. 483.

tional upon grounds which are not stated in the opinion of the court with sufficient clearness to enable us to feel confident that we correctly understand them. We judge, however, that the reasoning controlling the decision of the court was substantially this: No necessity existed for the sale; there were no charges, liens or assessments against the property; and no infancy or other necessity shown as to the parties interested under the will; and that, under these circumstances, the acts authorized the taking of property from one person and transferring it to another without any reason.³⁷² Whether the children of Eliza, "who had a vested remainder in fee, in the premises in question, as tenants in common, subject to open and let in after-born issue of their mother as tenants in common with them, and liable, however, to be divested by their deaths during the lifetime of their mother," were minors or adults, the report of the case very singularly omits to mention. The following reasoning of the court, in this case, tends very strongly toward the overthrow of all legislation authorizing the transfer of the property of one person by another, without any imperative necessity, and without the assent of the owner: "If the power exists to take the property of one, without his consent, and transfer it to another, it may as well be exercised without making any compensation as with it; for there is no provision in the constitution that just compensation shall be made to the owner when his property shall be taken for *private* use. The power of making contracts for the sale and disposition of private property for individual owners, has not been delegated to the legislature or to others, through or by any agency conferred on them for such purpose by the legislature; and if the title of A to property can, without his fault or consent, be transferred to B, it may as well be effected without as with consideration."³⁷³

In California, it is settled that the legislature can not au-

³⁷² Powers v. Bergen, 6 N. Y. 358. See Leggett v. Hunter, 19 N. Y. 445.

³⁷³ Powers v. Bergen, 6 N. Y. 367.

thorize an administrator to sell, at his discretion, the lands of his intestate, as in his judgment will best promote the interest of those entitled to the estate. In this case, the heirs of the deceased consisted of his widow and minor children. We make the following quotations from the opinion of the court: "It is undoubtedly within the scope of legislative authority to direct that the debts be paid from the realty instead of the personal property; or, as is done in some states, that the heir need not be made a party to the proceeding to obtain a sale of the real estate, or that the administrator may sell without any order of the court whatever. But all these acts must be for the satisfaction of these liens, which are held to be paramount to the claims of the heirs or devisees.

"Laws which prescribe the manner in which these paramount claims shall be satisfied, are held to be entirely remedial; and it is upon this ground that the courts have upheld acts authorizing the administrator to sell at private sale, or in some mode not provided in the general law, the land of a deceased person. Such acts have been uniformly held valid where it appeared to be in execution of these liens, and the act was not liable to the objection that, in passing it, the legislature usurped judicial functions, as, for instance, in directing a sale to pay a particular debt, thereby ascertaining the existence of a debt by legislative enactment.

"In all the cases to which our attention has been called by the plaintiff, the decision was put upon this ground. The duty of an administrator is to take charge of the estate for the purpose of settling the claims, and when they have been satisfied, it is his duty to pass it over to the heir, whose absolute property it then becomes. To allow the administrator to sell, to promote the interests of those entitled to the estate, would be to pass beyond the functions of an administrator, and constitute him the forced agent of the living for the management of their estates.

"In this case it does not appear, from the proceedings in the probate court upon the sale, that there were any debts

of the deceased at the time of the sale, nor does it appear that the sale was to raise money for the support of the family, or to pay the expenses of administration. The special act does not purport to authorize a sale for the payment of the debts, allowances to the family, or expenses of administration; on the contrary, it expressly authorizes a sale for the purpose of speculating in the interest of the owners of the property—that is, the heirs. It provides that the administrator may sell, at his discretion, ‘the whole or any part of the real estate, or any right, title or interest therein claimed, held or owned by the said Charles White at the time of his death, as in the judgment of the administrator will best promote the interest of those entitled to the estate.’ The probate judge may confirm or set aside the sale, as he may deem just and proper and for the best interests of the estate.

“Upon the death of the ancestor the heir becomes vested at once with the full property, subject to the liens we have mentioned; and, subject to these liens and the temporary right of possession of the administrator, he may at once sell and dispose of the property, and has the same right to judge for himself of the relative advantages of selling or holding that any other owner has. His estate is indefeasible except in satisfaction of these prior liens, and the legislature has no more right to order a sale of his vested interest in his inheritance, because it will be, in the estimation of the administrator and the probate judge, for his advantage, than it has to direct the sale of the property of any other person acquired in any other way. * * It is not contended that the legislature has the power to direct the sale and conveyance of private property for other than public uses. This question was fully considered, however, by us in *Sherman v. Buick*,³⁷⁴ and decided in the negative, and that conclusion is fully sustained by the numerous authorities cited by the defendant.’³⁷⁵

³⁷⁴ 32 Cal. 241.

³⁷⁵ *Brenham v. Story*, 39 Cal. 185.

We are unable to concur with the Supreme Court of California in the opinion foreshadowed in *Brenham v. Story*, and adopted in *Brenham v. Davidson*,³⁷⁶ that the power of the legislature to confer authority on guardians is, where the persons in interest are not *sui juris*, any more ample than its power to confer like authority in a like case on administrators. If the legislature has the power to authorize sales, we can not conceive that it is limited in the choice of agents to execute the power. It is true that the duties of administrators and guardians are somewhat different under the general laws in force in most of the states. But when a special act is passed, the power to be exercised is delegated and prescribed by the special act, and not by the general law. The power of the agent is not therefore limited by the fact that, before the passage of the act, he was an administrator, and, as such, had no authority under the general law to make a sale when, in his discretion, he thought best. Special acts authorizing sales are maintainable, if at all, because, in the language of Chancellor Walworth, "It is within the power of the legislature, as *parens patriæ*, to prescribe such rules and regulations as it may deem proper for the superintendence, disposition and management of the property and effects of infants, lunatics, and other persons who are incapable of managing their own affairs."³⁷⁷ If the persons interested in an estate are thus incapable, we see no reason why the power of disposing of their estate may not be delegated to an administrator, or even to a stranger, as well as to a guardian. The two California cases last cited are therefore irreconcilable in principle, and one or the other ought to be overruled; for, in each case, the legislature authorized a sale to be made without the assent of the owner of the property, and in the absence of any disclosed necessity therefor. In each case the person designated by the legislature was invested with a discretion to make the sale as he might deem best, except

³⁷⁶ *Brenham v. Davidson*, 51 Cal. 352.

³⁷⁷ *Cochran v. Van Surlay*, 20 Wend. 373.

that in the one case he was instructed to promote the interest of those interested in the estate, while in the other no such instruction was given. And yet the latter was upheld and the former suffered to fall, and this upon the ground that in the one case the person selected by the special act was a guardian, and in the other he was an administrator.³⁷⁸

In the case of a guardian's sale, the persons whose property is to be sold are within the reason of the rule as stated by Chancellor Walworth. In the case of a sale by an administrator, the heirs may or may not be within the reason of the rule as thus stated. If all the owners of the property are not *sui juris*, and are therefore within the reason of the rule, then the sale should be sustained, whether the agent selected by the legislature be an administrator or a guardian, or have no other official capacity than that given him by the act. If, on the other hand, any of the owners be *sui juris*, the sale must fall, if made against his will, whether the agent appointed to make it is a guardian or an administrator. Persons regarded in law as capable of conducting their own affairs, are entitled to act for themselves. They are the sole judges of the advisability of selling their property. The legislature can not, against *their* will, empower any other person to sell and convey *their* interests, even though infants, or persons not *in esse* have estates and interests in the same parcels of property.³⁷⁹

³⁷⁸ See *Brenham v. Davidson*, 51 Cal. 352; *Brenham v. Story*, 39 Cal. 185.

³⁷⁹ *Brevoort v. Grace*, 53 N. Y. 245; *Shoenberger v. School Directors*, 32 Pa. S. 34.

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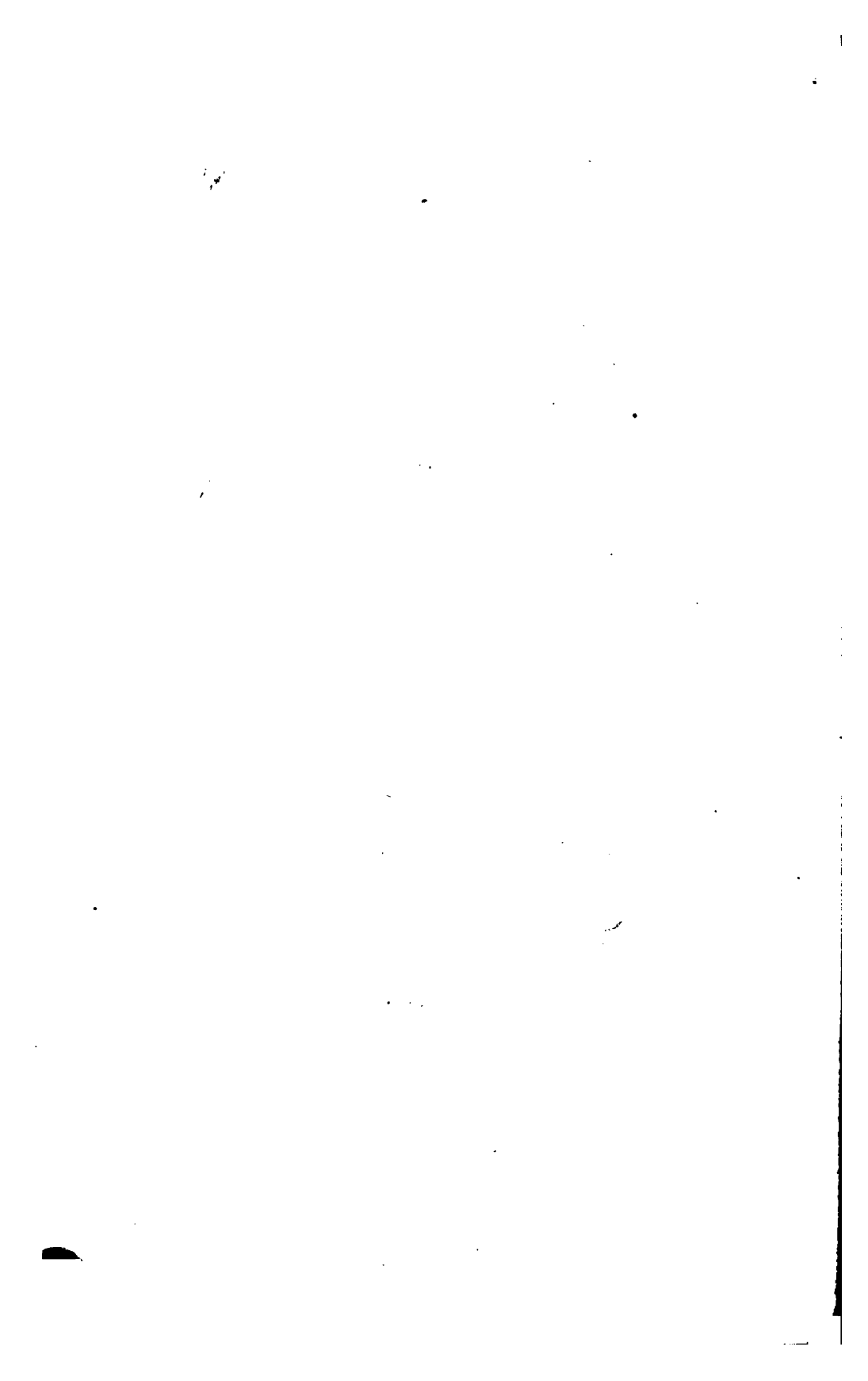
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EX
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EK_o

THE ENFORCEMENT

—OF—

JUDGMENTS AGAINST BANKRUPTS.

BY *Abraham*
Cork FREEMAN,

AUTHOR OF TREATISES ON "JUDGMENTS," "EXECUTIONS," "CO-
TENANCY AND PARTITION."

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THE ENFORCEMENT

—OF—

JUDGMENTS AGAINST BANKRUPTS.

- SECTION 1. Bankrupts, like other persons, are subject to the jurisdiction of the various courts.
- SEC. 2. Classification of Judgments against Bankrupts.
- SEC. 3. Judgments entered within four months prior to Bankruptcy, when may be avoided as unlawful preferences.
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- SEC. 12. Enforcing Proceedings in the State Courts.
- SEC. 13. Effect of a Discharge in Bankruptcy.
- SEC. 14. The Method of making a Discharge Available.

SECTION 1. *Bankrupts are, like other Persons, subject to the Jurisdiction of the Courts.*—The term bankrupt will, in this article, be employed to denote a person who has, either upon his own petition or that of one or more of his creditors, been “adjudged a bankrupt” in proceedings authorized by the present statutes of the United States. Before proceeding to consider the effect of any particular class of

judgments, or the means by which the holders thereof may make such judgments productive, we shall first inquire whether there are any judgments which may be regarded as having no validity against the bankrupt. The answer to this question must be, that a bankrupt, like most other persons, is subject to the jurisdiction of the different courts, state and national. When summoned to appear before one of these courts, he must not treat its process with contempt, nor assume that it will take judicial knowledge of those circumstances, which, if properly pleaded, would cause the court either to suspend its proceeding, or to grant judgment in his favor. In other words, whether an action be pending against a bankrupt prior to the commencement of the proceedings in bankruptcy, or commenced during the pendency of those proceedings, or subsequent to his final discharge, he must, in either case, exercise a proper degree of vigilance in preventing the entry of a judgment in conflict with his rights; for, if such judgment be entered, he will not be permitted to treat it as void.

SEC. 2. *Classification of Judgments against Bankrupts.*—Judgments capable of enforcement against a bankrupt and his estate will, for the sake of convenience, be classified as follows: *first*, judgments entered so long anterior to the institution of the proceedings in bankruptcy, that they can not be assailed on the ground that they were given with a view of permitting the plaintiff to obtain a preference over the other creditors of the bankrupt; *second*, judgments entered before the institution of the proceedings, but at so recent a date as to be liable to assault and overthrow if infected by such a preference; *third*, judgments entered after the commencement of the bankruptcy proceedings; and, *fourth*, judgments which, whensoever entered, are of such a character that the proceedings in bankruptcy do not afford the bankrupt any immunity therefrom. The judgments of the first class do not require any special consideration. Their validity must be conceded in the courts of bankruptcy. They can not, in those courts, be impeached for

error or irregularity, nor otherwise subjected to any collateral attack.¹

If they are presented as claims against the estate of the bankrupt, they, with all costs and interest accrued before the bankruptcy, are entitled to allowance.² Whether a judgment of this class constitutes a claim against the estate of the bankrupt must be determined by deciding whether it is a "debt," demand or liability within the meaning of Sec. 5067 of the Revised Statutes. Generally a judgment merges or extinguishes the cause of action out of which it arose, and is, therefore, entitled to the same consideration when founded upon a tort, as when founded on a contract. It is a "debt" irrespective of its origin. There is therefore no doubt that a judgment may be a provable debt, although the cause of action on which it was based could not have been proved as a claim against the bankrupt.³ As a general rule, all judgments of the class of which we are now writing are provable debts within the meaning of the Bankrupt Act.⁴ Judgments for fines imposed for the commission of crimes, or for contempts of court, are not within the general rule, and are not provable debts.⁵ Penalties given by statutes are treated as debts. A judgment for such a penalty is therefore provable.⁶ The pendency of an appeal does not destroy the provable character of a judgment.⁷

SEC. 3. *Judgments Entered within Four Months prior to the Bankruptcy.*—Judgments of the second class, when at-

¹ *McKinsey v. Harding*, 4 B. R. 39; *In re J. H. Dunn*, 11 B. R. 270; *In re Dibblee*, 2 B. R. 617; 3 Ben. 283; *Flanagan v. Pearson*, 14 B. R. 37; *In re Campbell*, 1 B. R. 165; 1 Abb. C. C. 185; 1 L. T. B. 30; *In re Burns*, 1 B. R. 174; 7 A. L. Reg. (N. S.) 105; 24 Leg. Int. 357.

² *Ex parte O'Neill*, 1 Lowell, 163; 1 B. R. 677.

³ 3 Parsons on Contracts, 6th ed., 466.

⁴ *In re J. W. Sidle*, 2 B. R. 220; *Boyd v. Vanderkemp*, 1 Barb. Ch. 273.

⁵ *In re Sutherland*, 3 B. R. 314; 1 Deady, 416; *Spalding v. State*, 4 How. (U. S.) 21; s. c., 10 Paige Ch., 284; 7 Hill, 301; *Macy v. Jordan*, 2 Den. 570.

⁶ *In re Rosey*, 8 B. R. 509.

⁷ *In re Sheehan*, 8 B. R. 345; *In re Gold. M. M. Co.* 3 Saw. C. C. 601.

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tempted to be asserted as the basis of a lien against the estate of the bankrupt, are likely to be attacked on the ground that, for the purpose of creating such liens, they are void by the provisions of sections 5021 and 5128 of the Revised Statutes.⁸ Section 5128 provides that "if any person, being insolvent, or in contemplation of insolvency, within four months before the filing of the petition by or against him, with a view to give preference to any creditor or person having a claim against him, procures or suffers any part of his property to be attached, sequestered, or seized on execution, or makes any payment, pledge, assignment, transfer, or conveyance, of any part of his property, either directly or indirectly, absolutely or conditionally, the person receiving such payment, pledge, assignment, transfer, or conveyance, or to be benefited thereby, or by such attachment, having reasonable cause to believe such person is insolvent, and knowing that such attachment, sequestration, seizure, payment, pledge, assignment, or conveyance, is made in fraud of the provisions of this title, the same shall be void, and the assignee may recover the property, or the value of it, from the person so receiving it, or so to be benefited." By section 5130 *a*, "in cases of involuntary or compulsory bankruptcy, the period of four months, mentioned in section 5128, is changed to two months." The judgments most frequently subjected to the scrutiny authorized by these sections are those rendered by confession, or upon default. When a confession of judgment, or a warrant, or other power to confess a judgment, is given more than four months prior to the filing of the bankrupt's petition, and a judgment is in fact entered by virtue thereof within the four months, the question then arises whether the validity of the judgment depends on the date of its entry, or the date of the warrant or power. The answer to this question was given by the Supreme Court of the United States: "In a case where a creditor, holding a confession of judgment perfectly valid when it was given,

⁸These are sections 35 and 39 of the original Bankrupt Act.

causes the judgment to be entered of record, how can it be said the debtor procures the entry at the time it is made? It is true the judgment is entered in virtue of his authority, an authority given when the confession was signed. That may have been years before; or, if not, it may have been when the debtor was perfectly solvent. But no consent is given when the entry is made where the confession becomes an actual judgment, and when the preference, if it be a preference, is obtained. The debtor has nothing to do with the entry. As to that, he is entirely passive. Ordinarily, he knows nothing of it, and he could not prevent it if he would. It is impossible, therefore, to maintain that such a judgment is obtained *when* his confession is placed on record.''⁹ It follows, therefore, that if the authority to confess the judgment was given more than four months before the filing of the petition, the judgment can not be avoided, merely because it was entered within that time.¹⁰ The opinion of the Supreme Court of the United States, in the case of *Clark v. Iselin*, just cited, is undoubtedly in antagonism to the views of many of the subordinate judges; and some of them are very loath to be governed by it. The case of *August Herpich* is a good illustration of what we have just stated. Herpich, being insolvent, executed certain warrants of attorney in February, 1876⁶, in consideration of prior indebtedness. A little more than two months later, judgments were entered on the warrants. Some ten days later, Herpich became an involuntary bankrupt. Conceding that the giving of the warrants was a fraudulent preference, the time within which they could be avoided had expired. The judge nevertheless refused to follow *Clark v. Iselin*, and held that the judgment based on the

⁹ *Clark v. Iselin*, 21 Wall. 360; 7 Ch. L. N. 185; 2 Cent. L. J. 210; 11 B. R. 337; reversing, 10 Blatch. 204.

¹⁰ *Clark v. Iselin*, cited above; *Piper v. Baldy*, 10 B. R. 517; 31 Leg. Int. 310; *Field v. Baker*, 11 B. R. 415; *Sleek v. Turner*, 10 B. R. 580; 1 A. L. T. 485; 31 Leg. Int. 308; *Contra*, *Zahm v. Fry*, 9 B. R. 546; 31 Leg. Int. 197; *Hood v. Karper*, 5 B. R. 358; 28 Leg. Int. 340; *Golson v. Neihoff*, 5 B. R. 56; 2 Biss. 434; *In re Terry*, 2 Biss. 356.

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warrants should not be allowed as a valid lien against the estate of the bankrupt.¹¹ A confession of judgment, or a warrant to confess judgment, given to secure a loan then made,¹² or given by an insolvent to secure a pre-existing debt, to a person who did not have reasonable cause to believe the debtor insolvent, is not an unlawful preference, and a judgment thereon is not void under the provisions of sections 5021 or 5128 of the Revised Statutes.¹³ To avoid any seizure or judgment by the aid of these sections, it is evident that these five circumstances must be established: 1st, that the debtor was insolvent, or contemplating insolvency; 2d, that while so, he procured or suffered the seizure or judgment; 3d, that the procuring or suffering was within the time specified by the Act; 4th, that it was with the view of giving a preference; and, 5th, that the person benefited had reasonable cause to believe the debtor insolvent, and that the latter was acting in fraud of the Act.¹⁴ When a creditor, knowing his debtor to be insolvent, pursues the latter by the ordinary remedy for the collection of his debt, and the latter, also knowing his own insolvency, makes no defense, and permits judgment to be entered against himself by default, within four months before the commencement of proceedings in bankruptcy, all these five circumstances seem almost necessarily to co-exist. The only ones which can be absent in such a case are, the view on the part of the debtor of giving a preference, and the creditor's knowledge that the debtor is suffering judgment to be entered in fraud of the provisions of the Act. But, as the debtor is presumed to intend the necessary consequence of his own act, and as, in such a case, his inaction so uniformly leads to the obtaining of a preference in favor of the cred-

¹¹ *In re Herpich*, 9 Ch. L. N. 253.

¹² *Clark v. Iselin*, cited above.

¹³ *Mays v. Fritton*, 20 Wall. 414; 11 B. R. 229.

¹⁴ *Clark v. Iselin*, 7 Ch. L. N. 185; 2 Cent. L. J. 210; 11 B. R. 337; *Hoover v. Greenbaum*, 61 N. Y. 305; *Webb v. Sachs*, 9 Ch. L. N. 156; 15 B. R. 168.

itor, and thereby accomplishes the result which the Bankrupt Act was intended to avoid, it was, for a considerable time, almost conceded that a judgment so permitted was necessarily "suffered" "with a view to give a preference," and that the creditor knew it was so suffered; and that he could, therefore, derive no benefit from it out of the bankrupt's estate.¹⁵ Different views finally prevailed in the Supreme Court of the United States. It was there maintained that, to render a judgment obnoxious to the Bankrupt Act, there must exist in the mind of the debtor a positive purpose or intent to defeat or delay the operation of the Act, or to accomplish something which the Act treated as unlawful; that it would be immoral for him to oppose or impede his creditor by false or dilatory pleas; that he was under no moral or legal obligation to file his petition in bankruptcy; and, as the result of these propositions, that the debtor could not be presumed to have been actuated by an unlawful purpose, from the fact that he neither perpetrated the wrong of defending against a just claim, nor made an application to the courts of bankruptcy, when he was under no obligation to make such application.¹⁶ In such cases the *intent* of the debtor is the turning-point; and what this intent was, must be determined from the consideration of all the attending circumstances.¹⁷ While an unlawful intent is not to be inferred from mere "passive non-resistance to regular judicial proceedings," "undoubtedly very slight evidence of an affirmative character of the existence of a desire to prefer one creditor, or of acts done with a view to secure such preference, might be sufficient to invalidate the whole transaction. Such evidence might be sufficient to

¹⁵ Warren v. D. L. & W. R. W. Co., 7 B. R. 451; 5 Ch. L. N. 205; *In re McGie*, 2 Biss. 163; *In re Heller*, 3 Biss. 153; Wilson v. Brinkman, 2 B. R. 468; Buchanan v. Smith, 16 Wall. 277; 5 Ch. L. N. 277.

¹⁶ Wilson v. City Bank, 17 Wall. 489; 6 Ch. L. N. 149; 9 B. R. 97; Britton v. Payen, 9 B. R. 445; Partridge v. Dearborn, 9 B. R. 474; Henkelman v. Smith, 12 B. R. 121; 42 Md. 164; Loucheim v. Henszey, 77 Penn. St. 305.

¹⁷ Little v. Alexander, 21 Wall. 500; 7 Ch. L. N. 339; 12 B. R. 134.

leave the matter to a jury, or to support a decree, because the known existence of a motive to prefer or to defraud the Bankrupt Act would color acts or decisions otherwise of no significance.”¹⁸ When a judgment is sought to be employed to secure a preference forbidden by the Bankrupt Act, the usual and most convenient method of thwarting this purpose, and of litigating the issues necessarily involved, is by filing a bill in equity on behalf of the assignee.¹⁹

SEC. 4. *Validity of Judgments Entered after the Filing of the Petition in Bankruptcy.*—Actions pending in state courts do not abate by virtue of proceedings in bankruptcy by or against either of the litigants.²⁰ Section 5047²¹ provides that the assignee may, if he requires it, be permitted to prosecute or defend actions which, at the commencement of the proceedings in bankruptcy, are being prosecuted or defended by the bankrupt. This section clearly contemplates that all pending actions shall proceed to judgment; but gives the assignee ample opportunity to protect all the rights which have vested in him by virtue of the assignment. If he does not interpose, the action will proceed to judgment in the same manner as though no proceedings in bankruptcy had been instituted. But, by section 5105,²² a creditor who has proved his debt, is not allowed to maintain any suit against the bankrupt therefor; and all proceedings already commenced are deemed to be discharged. By section 5106,²² creditors whose debts are provable are not allowed to prosecute to judgment any action thereon, until the question of the bankrupt's discharge is determined; pending suits are to be stayed, on application of the bank-

¹⁸ *Wilson v. City Bank*, 17 Wall. 489; *Beattie v. Gardner*, 4 B. R. 323; 4 Ben. 479; see also 3 Cent. L. J. 651, referring to *Ripley v. Sears*, decided by Judge Dillon; *In re J. E. Baker*, 14 B. R. 433; 14 A. L. J. 294.

¹⁹ *Kellogg v. Russell*, 11 B. R. 121; *Warren v. Tenth N. B.*, 7 B. R. 481; 10 Blatch. 493.

²⁰ *In re Irving*, 14 B. R. 289; *Hewett v. Norton*, 1 Woods, 68.

²¹ Sec. 16 of Act of 1867.

²² Sec. 21 of Act of 1867, contained similar provisions.

rupt, to await the determination of the question of the discharge, provided there is no unreasonable delay in endeavoring to procure the discharge; but, if the amount due is in dispute, the suit, by leave of the court of bankruptcy, may proceed for the purpose of ascertaining such amount. Thus, it will be seen that, in many cases, even where the pending proceedings in bankruptcy are properly brought to the attention of the state court, it must proceed to judgment; and the judgment, when entered, must have the same validity as other judgments properly obtained. In the case of provable debts, the statute provides that the stay of proceedings shall be granted "upon the application of the bankrupt."²³ The assignee may, nevertheless, obtain a stay of proceedings.²⁴ But it is evident that the court need not take judicial knowledge of the bankruptcy proceedings; nor would it be proper for it to refuse to proceed in those cases where neither the assignee nor the bankrupt seeks the benefit of the proceedings in bankruptcy.²⁵ If an action has been stayed, the stay should be revoked if it appears that the bankrupt is guilty of unreasonable delay in seeking his discharge.²⁶ From the fact that the court, in which an action is pending, is not divested of its jurisdiction by bankruptcy proceedings involving either litigant, we infer that its judgments, given in the exercise of this jurisdiction, though founded in error, are not, on that account, void. The rendition of judgments against bankrupts, or their assignee, establishes either that the defendants waived their rights, or else that the court determined that the case was one in which it was proper to give the judgment entered. The judgment, if erroneous or irregular, should be corrected by appeal or by some appropriate proceeding in the tribunal where it was entered.

²³ Rev. St., Sec. 5106; Sec. 21 of Act of 1867.

²⁴ Sampson v. Burton, 4 B. R. 1; 5 Ben. 325.

²⁵ Palmer v. Merrill, 57 Me. 26; Stone v. Nat'l Bank, 39 Ind. 284.

²⁶ *In re Belden*, 6 B. R. 443; 5 Ben. 476; *Dingee v. Becker*, 9 B. R. 508; 31 Leg. Int. 156.

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Even where the suit is instituted in a state court subsequent to the adjudication of bankruptcy, the judgment in such suit is not on that account void, but is binding upon all the defendants upon whom the summons to appear was served in the manner prescribed by law,²⁷ until they shall cause it to be vacated or reversed. Nor can a bankrupt who permits a judgment to be entered against him by default obtain an injunction to prevent its enforcement against him personally.²⁸ If an action is pending in a state court prior to the filing of the bankrupt's petition, it will properly proceed to judgment unless the bankrupt, or his assignee, discloses to the court the existence of the adjudication of bankruptcy.²⁹ Even where an attachment on *mesne* process has been levied within four months prior to the filing of the petition, and is therefore dissolved by the provisions of section 5044,³⁰ the assignee is not warranted in treating the court issuing, nor the officer serving, the attachment with contempt. He is not to seize the property, and by force wrest it from the possession of the officer of the state tribunal. He should go into that tribunal, allege and establish the adjudication of bankruptcy and the assignment made in pursuance thereof, and ask that the attachment be dissolved, and that the officer be required to surrender possession of the property.³¹ But, by section 5044, an assignment relates back to the commencement of the proceedings in bankruptcy, and, by operation of law, vests title in the

²⁷ *In re Davis*, 8 B. R. 167; 1 Saw. C. C. 260; *In the Matter of Sacchi*, 43 How. Pr. 250; *Bradford v. Rice*, 102 Mass. 472; *McKay v. Funk*, 13 B. R. 334; *Brown v. Gibbons*, 13 B. R. 407.

²⁸ *In re Tooker*, 14 B. R. 35; *Bellamy v. Woodson*, 4 Ga. 175; *Steward v. Green*, 11 Paige, 535.

²⁹ *Dunbar v. Baker*, 104 Mass. 211; *Doe v. Childress*, 21 Wall. 643; 7 Ch. L. N. 201; *Palmer v. Merrill*, 57 Me. 26; *Hewett v. Norton*, 13 B. R. 276; *Valliant v. Childress*, 11 B. R. 317; *Flanagan v. Pearson*, 14 B. R. 37; *Lenihan v. Haman*, 6 Ch. L. N. 63; 55 N. Y. 652; 8 B. R. 557; *Eyster v. Gaff*, 13 B. R. 546; 8 Ch. L. N. 177; 1 Otto, 521; 3 Cent. L. J. 250.

³⁰ Sec. 14 of Act of 1867.

³¹ *Kent v. Downing*, 44 Ga. 116; *Johnson v. Bishop*, 1 Woolw. 324; 8 B. R. 533; *Huber v. Klauberg*, 4 Cent. L. J. 342.

assignee, though the property is attached on *mesne* process; and dissolves any such attachment made within four months prior to the commencement of the proceedings in bankruptcy. Under the operation of this section, the dissolution of attachments is so unequivocal, that a sale, made under an attachment not four months old, is probably void, although no application was ever made for the release of the property from the operation of the writ.³² If the attachment was levied more than four months prior to the filing of the petition, the court issuing the writ may, after the adjudication of bankruptcy, enter a judgment authorizing the sale of the property as levied upon; and a sale in pursuance of such judgment will relate back to the levy, and transfer title free of the claims of the bankrupt's assignee.³³

SEC. 5. *Enforcing Judgments Entered Subsequent to the Filing of the Petition in Bankruptcy.*—In the preceding section we have shown that a judgment, entered against a bankrupt after the commencement of the proceedings in bankruptcy, is not, for that reason, void. Relief against such a judgment can usually be obtained by the bankrupt, on prompt application, by proving a state of facts which is sufficient to show that he was not guilty of laches in not pleading the pending proceedings in bankruptcy, for the purpose of preventing the entry of the judgment.³⁴ Thus, he may, on motion, obtain a perpetual stay of execution, if he can make it appear to the court that, when his petition was filed, the action against

³² *Bracken v. Johnson*, 4 Cent. L. J. 9; 15 B. R. 106.

³³ *Doe v. Childress*, 21 Wall. 643; 7 Ch. L. N. 201; *Valliant v. Childress*, 11 B. R. 317; *Batchelder v. Putnam*, 13 B. R. 404; *Munson v. B. H. & E. R. R. Co.*, 14 B. R. 173; *Stoddard v. Locke*, 43 Vt. 574; 9 B. R. 71; *Daggett v. Cook*, 37 Conn. 341; *Bates v. Tappan*, 99 Mass. 376; 3 B. R. 647; *Leighton v. Kelsey*, 57 Me. 85; 4 B. R. 471; *Bowman v. Harding*, 56 Me. 559; 4 B. R. 20; *May v. Courtney*, 47 Ala. 185; *Johnson v. Collins*, 116 Mass. 392; *Rowe v. Page*, 13 B. R. 366; 54 N. H. 190; *Mason v. Warthens*, 7 West Va. 532; *Munson v. B. H. & E. R. R. Co.*, 14 B. R. 173.

³⁴ *N. H. Savings Bank v. Webster*, 48 N. H. 21.

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him had proceeded so far that he had no opportunity to avail himself of the proceedings in bankruptcy for the purpose of staying such action.³⁵ If, however, he has been guilty of laches, relief will be denied.³⁶ Assuming that a judgment against a bankrupt, entered pending the bankruptcy proceedings, has been procured under such circumstances that he is not entitled to its vacation, the next inquiry is for means of obtaining its satisfaction.³⁷ If an execution is issued, it is evident that it can not be levied upon any property which has vested in the assignee in bankruptcy, except when the judgment is but the means of enforcing some lien paramount to the title of the assignee. Property acquired subsequent to the filing of the bankrupt's petition can, no doubt, be levied upon. The most difficult, as well as the most unsettled, question concerning judgments entered pending proceedings in bankruptcy, is this: Can such judgments, or the causes of action on which they are based, be proved as claims against the estate of the bankrupt? If the cause of action was not provable as a claim, then certainly the judgment, though entered pending the proceedings in bankruptcy, can not be so proved.³⁸ But usually the cause of action is of such a nature that it did, before the entry of the judgment thereon, constitute a provable claim against the estate of the bankrupt. No claim can be allowed, unless it was due or existing "at the time of the commencement of proceedings in bankruptcy."³⁹

³⁵ *Monroe v. Upton*, 50 N. Y. 593.

³⁶ *Monroe v. Upton*, 50 N. Y. 593; *Valkenburgh v. Dederick*, 1 Johns. Ca. 133; *Cross v. Hobson*, 2 Cal. Ca. 102; *Manwarring v. Kouns*, 35 Tex. 171; *Park v. Casey*, 35 Tex. 536.

³⁷ We assume in this section that a judgment, entered after the filing of the bankrupt's petition, is not affected thereby, and is not released by his subsequent discharge. Whether this assumption is correct or incorrect, will be considered in the section on the judgments affected by a discharge.

³⁸ *Black v. McClelland*, 12 B. R. 481; *Kellogg v. Schuyler*, 2 Den. 73; *In re Hennocksburgh*, 7 B. R. 37; 6 Ben. 150; *Ellis v. Ham*, 28 Me. 385.

³⁹ R. S., sec. 5067. Sec. 19 of the Act of 1867, was somewhat different in its terms.

A judgment, entered subsequently to those proceedings, certainly can not be due nor existing prior thereto. Moreover, it is well known that a judgment usually, for most purposes, is a complete extinguishment of the cause of action out of which it grew. The latter is drowned or merged in the former.⁴⁰ Hence, in several cases, courts, proceeding to what seems to us logical conclusions from conceded legal principles, have affirmed that judgments, entered pending bankruptcy proceedings, are new debts not existing at the commencement of such proceedings, and, therefore, not provable as claims therein; and, further, that the causes of action, resulting in such judgments, are thereby merged and extinguished, and thus are as effectually deprived of their capacity to be proved as claims, as if they had been terminated by actual payment.⁴¹ It is also urged that "the creditor, by taking judgment, and so changing the form of his debt, and securing to himself the benefit of conclusive and permanent evidence of it, and an extension of the period of limitation of an action thereon, is held, on his part, to have elected to look to the debtor personally, and to abandon the right to prove against his estate; and the debtor, on the other hand, who might have protected himself by moving the court in which the action was pending for a continuance, in order to afford him an opportunity to obtain and plead a certificate of discharge, is held, by omitting to make such a motion before judgment, to have waived the right to set up his certificate against the plaintiff's claim; and therefore the rights of both parties must be governed by the judgment which the one has moved for, and the other has suffered to be rendered."⁴² But, perhaps,

⁴⁰Freeman on Judgments, chapter XI.

⁴¹Bradford v. Rice, 102 Mass. 472; 3 Am. Rep. 483; Holbrook v. Foss, 27 Me. 441; Cutter v. Evans, 115 Mass. 27; *In re D. B. Williams*, 2 B. R. 229; 3 A. L. Reg. 374; 1 L. T. B. 107; Pike v. McDonald, 32 Me. 418; *In re A. S. Mansfield*, 6 B. R. 388; *In re Gallison*, 5 B. R. 353; 2 L. T. B. 195.

⁴²Bradford v. Rice, 102 Mass. 473; 3 Am. Rep. 483; Sampson v. Clark, 2 Cush. 173; Woodbury v. Perkins, 5 Cush. 86.

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the authorities slightly preponderate in favor of the position that the taking of a judgment, pending proceedings in bankruptcy, does not prevent the plaintiff from proving his claim against the bankrupt's estate.⁴³ These authorities do not agree whether it is the judgment or the original debt that must be proved, though they concur in excluding from the provable claim the costs of entering the judgment. On the one side it is said that, because the original debt is merged, the judgment must be proved.⁴⁴ On the other side, it is claimed that, because the judgment had no existence at the date of the bankruptcy, it is the original cause of action that the creditor must rely upon as a claim against the bankrupt's estate.⁴⁵ The fact that those who insist, that a provable debt is not waived or extinguished as a claim against the bankrupt's estate by taking a judgment thereon pending the bankruptcy proceedings, are unable to concur in any common defense of their position, is, in our judgment, an indication that the position itself is untenable in principle. If this position shall ultimately prevail, as is altogether probable, the result must be recognized as one of the frequent triumphs which considerations of hardship and inconvenience win over abstract principles.

What has already been said concerning judgments pending bankruptcy proceedings must be understood as applying to those cases only which are prosecuted without leave of the courts of bankruptcy. When leave to proceed by action is sought and obtained, the purpose of the action is confined to ascertaining the amount due to the creditor; and the amount thus ascertained may, by an express statutory provision, be proved as a claim in bankruptcy.⁴⁶

⁴³ *Monroe v. Upton*, 50 N. Y. 593; *Clark v. Rowling*, 3 N. Y. 216; *Harrington v. McNaughton*, 20 Vt. 293; *Downer v. Rowell*, 26 Vt. 397.

⁴⁴ *In re Crawford*, 3 B. R. 698; 1 L. T. B. 211; 3 L. T. B. 169; *In re Stephens*, 4 B. R. 367; 4 Ben. 513; 2 L. T. B. 121.

⁴⁵ *In re Stephen Brown*, 3 B. R. (Quart.), 145; 5 Ben. 1; *In re L. H. Rosey*, 8 B. R. 509; 6 Ben. 507.

⁴⁶ R. S., Sec. 5106; Sec. 21 of Act of 1867.

SEC. 6. *Proceedings by Execution pending Proceedings in Bankruptcy.*—By Section 5105⁴⁷ of the Revised Statutes, if a creditor proves his debt or claim, “all proceedings already commenced, or unsatisfied judgments already obtained thereon against the bankrupt, shall be deemed to be discharged and surrendered thereby.” The discharge here spoken of is evidently not an extinguishment, but merely a suspension of the right to proceed upon the debt. If a discharge be refused, or the proceedings terminate without a discharge, or if the debt be one against which the discharge does not operate, then it is evident that the debt may be resuscitated and become susceptible of enforcement. If a judgment is proved as a claim against a bankrupt, it is evident that no steps can without leave of the court, pending the bankruptcy proceedings, be properly taken to procure its satisfaction out of his assets. And if any levy should be made, no doubt it would be vacated on application to the court issuing the writ.⁴⁸ If the judgment creditor does not prove his judgment as a claim, the Bankrupt Act, so far as we can discover, does not prohibit him from issuing execution pending the proceedings in bankruptcy. An execution would, however, probably prove unproductive, unless issued for the enforcement of some lien antedating the bankruptcy. No levy could be made on the estate of the bankrupt; for that, by operation of law, vests in the assignee at the date of the filing of the debtor’s petition. And, in any event, it is probable that a stay of proceedings would be granted, on application to the court issuing the writ, to allow the defendant an opportunity to obtain his discharge, if it appeared that said discharge would, when obtained, release the debtor from the particular judgment sought to be asserted against him. If, however, an execution issues and is levied prior to the proceedings in bankruptcy, the judgment creditor is entitled to proceed unless enjoined from so doing. If the judgment is one on which

⁴⁷ Sec. 21 of Act of 1867.

⁴⁸ *Dingee v. Becker*, 9 B. R. 508; 31 Leg. Int. 156.

an execution against the person of the defendant may issue, he is not liable to arrest, "unless the same is founded on some debt or claim from which his discharge in bankruptcy would not release him."⁴⁹ With respect to the judgments under which execution may issue against the person of the debtor, the rule seems to be that, if the defendant is under arrest when the bankruptcy proceedings are instituted, there is no means by which, pending those proceedings, he can procure his release through the operation of the Bankrupt Act,⁵⁰ and that, on the other hand, if he is not under arrest when those proceedings are instituted, he is entitled to exemption during their pendency, except when pursued for some "debt or claim from which his discharge in bankruptcy would not release him."⁵¹ It has been held, and, as we think, with great propriety, that the application for release from arrest should first be made to the court under whose writ it was made.⁵² But the courts of bankruptcy are not inclined to accede to this proposition, and are in the habit of themselves adjudicating upon the lawfulness of the arrest, and granting releases where they think proper, without first compelling resort to the state courts.⁵³ Whether the application for the release of a bankrupt from arrest under execution be made to a state or to a federal court, both he and the plaintiff are bound by the proceedings in the court issuing the writ. If, from those proceedings taken as a whole, it appears that the claim is one from which his discharge in bankruptcy would not release him, he will not be set at liberty. In other words, neither party will be al-

⁴⁹ Rev. Stats., sec. 5107; Sec. 26 of Act of 1867.

⁵⁰ *In re Walker*, 1 B. R. 318; 1 Lowell, 222; *Hazleton v. Valentine*, 2 B. R. 31; 1 Lowell, 270; *Minor v. Van Nostrand*, 4 B. R. 108; 1 Lowell, 458.

⁵¹ Sec. 5107; *In re Wiggers*, 2 Biss. 71; *In re Patterson*, 1 B. R. 307; 2 Ben. 155; *In re Miffin*, 1 Penn. L. J. 146; *Horter v. Harlan*, 7 B. R. 238; 29 Leg. Int. 229; *In re Devoe*, 2 B. R. 27; 1 Lowell, 251; 1 L. T. B. 90; *Usher v. Pease*, 116 Mass. 440.

⁵² *In re M. O'Mara*, 4 Biss. 506; *In re Migel*, 1 B. R. 481.

⁵³ *In re Williams & McPheeters*, 11 B. R. 145; 7 Ch. L. N. 49; *In re Glaser*, 1 B. R. 366; 2 Ben. 180; 1 L. T. B. 57; *In re Borst*, 2 B. R. 171; *In re Valk*, 3 B. R. 278; 3 Ben. 431; *In re Simpson*, 2 B. R. 47.

lowed to contest the matters which must have been once determined in the original action.⁵⁴

SEC. 7. *Judgments not Released by Proceedings in Bankruptcy.*—In considering this question, attention must be directed to sections 5117, 5118 and 5119 of the Revised Statutes. The first-named section declares that “no debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character,⁵⁵ shall be discharged by proceedings in bankruptcy.” The claim has sometimes been made that, by the entry of a judgment, the original cause of action is so merged that it can not be referred to for the purpose of giving character to the judgment, and taking such judgment outside of the operation of the bankrupt’s discharge. But the better opinion is that the doctrine of merger can not prevail to this extent. “Whenever the debt, no matter whether it be in the shape of a judgment or in any other form, was created by fraud, had its root and origin in fraud, there it is not to be discharged. To hold that the recovery of a judgment, in an action where the gravamen of the complaint is fraud, condones that very fraud, by so merging the original claim that the judgment can not be said to be a debt created by the fraud set out in the complaint as the ground for recovering the judgment, would fritter away entirely the good sense and plain intention of the 33d section.”⁵⁶ If a judgment is shown by competent evidence to be founded on any of the causes of action specified in section 5117, then the defendant continues liable, notwithstanding his discharge.⁵⁷ The competent

⁵⁴ *In re Pettis*, 2 B. R. 44; 7 A. L. Reg. 695; *In re Valk*, 3 B. R. 278; 3 Ben. 431; *In re Devoe*, 2 B. R. 27; 1 Lowell, 251; 1 L. T. B. 90; *In re Kimball*, 2 B. R. 204, 354; 2 Ben. 554; 6 Blatchf. 292; *In re Robinson*, 2 B. R. 342; 36 How. P. 176; 6 Blatchf. 253; 2 L. T. B. 18; *Cutter v. Dingee*, 14 B. R. 294.

⁵⁵ Sec. 33 of Act of 1867.

⁵⁶ *In re Patterson*, 1 B. R. 307; 2 Ben. 155. The 33d section referred to in this decision corresponds with section 5117 of the Revised Statutes.

⁵⁷ *Warner v. Cronkhite*, 15 B. R. 52; 8 Ch. L. N. 17; *In re J. W. Sey-*

evidence by which to show the true foundation of the judgment must, we think, be limited to the record in the case in which the judgment was rendered.⁵⁸ Both parties ought to be prohibited from showing any facts inconsistent with the record.⁵⁹ A judgment, not conclusive against the defendant by the laws of the state where it was entered, so as to estop him from denying that the debt was created by fraud, is released by his discharge, unless it can be shown that such debt was founded in fraud; and whether this showing can be made by proof outside of the record is not fully settled.⁶⁰ If a plaintiff, having a cause of action in fraud, waives the fraud and proceeds to obtain judgment as upon a contract, he can not thereafter avoid the defendant's discharge by showing that the debt was created by fraud.⁶¹

Section 5118⁶² of the Revised Statutes provides that "no discharge shall release, discharge, or affect any person liable for the same debt for or with the bankrupt, either as partner, joint contractor, indorser, surety or otherwise." The signification of this section is too obvious to require any explanation. By it, proceedings in bankruptcy against one judgment debtor leave the judgment in full force against his co-debtors.⁶³

Section 5119 of the Revised Statutes⁶⁴ further limits the operation of discharges in bankruptcy to such "debts, claims, liabilities and demands" as were or might have

mour, 6 Int. Rev. Record, 61; *In re Whitehouse*, 4 B. R. 63; 1 Lowell, 429; *Whitaker v. Chapman*, 3 Lans. 155; *In re Patterson*, 1 B. R. 307; 2 Ben. 155; *In re W. E. Robinson*, 2 B. R. 342; 6 Blatchf. 253; *Flanagan v. Pearson*, 14 B. R. 37; 42 Tex. 1; *Horner v. Spelman*, 78 Ill. 206.

⁵⁸ See cases just cited.

⁵⁹ *In re J. S. Wright*, 2 B. R. (Quart.) 57; *Palmer v. Preston*, 45 Vt. 154; 12 Am. R. 191; *Flanagan v. Pearson*, 42 Tex. 1; 14 B. R. 37; *In re Robinson*, 2 B. R. 342; 6 Blatchf. 253.

⁶⁰ *Shuman v. Strauss*, 52 N. Y. 404; 10 B. R. 300; 34 N. Y. Super. Ct. 6.

⁶¹ *Palmer v. Preston*, 45 Vt. 154; 12 Am. R. 191.

⁶² Sec. 33 of Act of 1867.

⁶³ *Linn v. Hamilton*, 34 N. J. L. 305; *In re Levy*, 1 B. R. 220; 2 Ben. 169.

⁶⁴ Sec. 34 of Act of 1867.

been proved against the estate in bankruptcy. By this section, all judgments provable in bankruptcy are released, unless they fall within the prohibitions of section 5117 or 5118. Hence, every provable judgment founded in tort is released by the bankrupt's discharge, unless the tort is within the provisions of section 5118.⁶⁵ The chief question arising in regard to judgments under section 5119 of the Revised Statutes is, whether judgments entered pending the proceedings in bankruptcy, on causes of action existing prior to such proceedings, may be treated as provable as claims against the estate of the bankrupt. The question has already been considered in section five. It was there shown to be involved in insoluble doubt. A like doubt exists in regard to the effect of a discharge upon such judgments. All that can be said is, that in many courts such judgments are regarded as within the scope of the discharge;⁶⁶ while, in probably an equal number of courts, the discharge is treated in such circumstances as entirely inoperative.⁶⁷ If an action be pending against a bankrupt before or during the existence of the proceedings in bankruptcy, and a judgment be entered therein after the granting of his discharge, such discharge does not release the judgment.⁶⁸ The entry of a judgment against a defendant necessarily implies that he is *then* liable for the amount of such judgment. If, at a subsequent date, he undertakes to show that by some means the cause of action against him terminated before the entry of the judgment, he tenders an issue which ought not to be made the subject of inquiry as long as the judgment remains in force. "The obstinacy with which litigants press

⁶⁵ *In re Wiggers*, 2 Biss. 71; *Manning v. Keyes*, 9 R. I. 224; *Comstock v. Grout*, 17 Vt. 512; *In re Comstock*, 22 Vt. 642.

⁶⁶ *Harrington v. McNaughton*, 20 Vt. 293; *Dresser v. Brooks*, 3 Barb. 429; *Johnson v. Fitzhugh*, 3 Barb. Ch. 360; *McDonald v. Ingraham*, 30 Miss. 389; *Clark v. Rowling*, 3 N. Y. 216; *Rogers v. Ins. Co.*, 1 La. Ann. 161; *Dick v. Powell*, 2 Swan, 632.

⁶⁷ *Bradford v. Rice*, 102 Mass. 472; 3 Am. Rep. 483; *Ellis v. Ham*, 28 Me. 385; *Kellogg v. Schuyler*, 2 Den. 73; *Uran v. Houdlette*, 36 Me. 15; *Roden v. Jaco*, 17 Ala. 344.

⁶⁸ *Hollister v. Abbott*, 31 N. H. 442; *Rees v. Butler*, 18 Mo. 173.

their claims upon the attention of courts, is such that it is not uncommon for matters once fully determined to be again made, or at least attempted to be made, the subjects of judicial inquiry. Sometimes, the circumstances attending the former decision are such as to render the application of the law of *res judicata* apparently a matter of great injustice. Hard cases have been characterized as the quick-sands of the law. Such cases are quick-sands in which the law of *res judicata* sometimes sinks so far, that the judges are entirely unable to see it, or even to remember it. Generally, however, such is not the case; and the instances are comparatively few, in which any cause of action or matter of defense is allowed to prevail, where it is inconsistent with the facts necessary to uphold any previous adjudication between the same parties."⁶⁹ If a judgment debtor undertakes to show that the judgment ought not to have been entered against him because of a discharge, or of pending proceedings in bankruptcy, then he offers to reopen an issue which either was litigated or ought to have been litigated prior to the rendition of the judgment. If the issue was in fact presented and determined, then he is unquestionably bound by that determination. If, through his neglect, it was not presented for determination, he ought equally to be bound by the judgment against him and precluded from asserting his discharge. If, without fault or laches on his part, he failed to present this issue, then he ought to take such proceedings as, by opening the judgment, will enable him to present it. Otherwise he ought to be held liable to satisfy the judgment against which he makes no complaint.

SEC. 8. *Judgment and Execution Liens are not Extinguished by Bankruptcy.*—When a judgment is in existence against a bankrupt, the judgment creditor will seek to make it productive by proceeding either in the court of bankruptcy or in the court where it was rendered; or it may happen that circumstances will arise making it proper to

⁶⁹ Freeman on Judgments, sec. 284a. See *Ibid.*, secs. 285 to 289.

proceed in both courts. If the judgment is not a lien on the bankrupt's estate, or has not been followed by an execution or levy constituting a lien, it is no more than a simple unpreferred claim; and, if the plaintiff wishes to secure its payment out of the assets in the hands of the assignee, he must present it and procure its allowance in the same manner as other unsecured claims. It is only when a judgment is a lien, or the foundation upon which a lien rests, that its assertion is likely to call for special attention or to occasion special resistance in the bankruptcy court. Let us now inquire when a judgment must be treated as a valid lien, or as the foundation of a valid lien, against the estate of the bankrupt. All liens are preserved in bankruptcy,⁷⁰ except those based on attachments on *mesne* process levied within four months before the filing of the petition, and those which can be avoided by showing that they were procured or preferred with a view of giving the preference prohibited by sections 5021 and 5128, to which reference has already been made. But no valid lien against the estate of a bankrupt can be created after such estate has, in contemplation of law, vested in his assignee. And the title of the assignee, by virtue of the provisions of section 5044, relates "back to the commencement of the proceedings in bankruptcy. Every judgment⁷¹ or execu-

⁷⁰ *In re Hambright*, 2 B. R. 498; 2 L. T. B. 61; 1 Ch. L. N. 201; *Austin v. O'Reilly*, 2 Cent. L. J. 455; *House v. Swanson*, 7 Heisk. 32; *Haughton v. Eustis*, 5 Law Rep. 505; *In re Angier*, 4 B. R. 619; 10 A. L. Reg. (N. S.) 190; 1 L. T. B. 48; *In re Hester*, 5 B. R. 285; *In re N. Y. M. S. Co.*, 2 B. R. 74; *In re W. H. Wiley*, 4 Biss. 171; *In re Perdue*, 2 B. R. 183; 2 West. Jur. 279; *The Ironsides*, 4 Biss. 518; *Parker v. Muggridge*, 2 Story, 334; *Fletcher v. Morey*, 2 Story, 555; *In re Wynne*, 4 B. R. 23; 2 L. T. B. 116; 9 A. L. Reg. (N. S.) 627; *Avery v. Hackley*, 20 Wall. 407; *Phillips v. Bowdoin*, 14 B. R. 43; *Hatcher v. Jones*, 14 B. R. 387; *Barron v. Morris*, 15 B. R. 371; *Wilcox v. Pollard*, 9 Ch. L. N. 180.

⁷¹ *Meeks v. Whatley*, 10 B. R. 501; *Phillips v. Bowdoin*, 14 B. R. 43; *Winship v. Phillips*, 14 B. R. 50; *In re Smith and Smith*, 1 B. R. 599; 2 Ben. 122; 1 L. T. B. 112; *Catlin v. Hoffman*, 9 B. R. 342; 2 Saw. C. C. 486; *Witt v. Hereth*, 8 Ch. L. N. 41; 13 B. R. 106; *Webster v. Woolbridge*, 3 Dill. 74; *In re Cook*, 2 Story C. C. 376; *Partridge v. Dearborn*, 9 B. R. 474; *Haworth v. Travis*, 13 B. R. 145; *Livingston v. Livingston*,

tion⁷² lien, or lien created by the levy of an execution,⁷³ which, anterior to the commencement of the proceedings in bankruptcy, was a lien against the estate of the bankrupt, continues in force against such estate in the hands of the assignee, unless he can show that it was procured or suffered to give a preference forbidden by the Bankrupt Act.

SEC. 9. *Enforcing Judgment and other Liens in Courts of Bankruptcy.*—When a judgment creditor has either of the liens specified in the preceding section of this article, and desires to obtain the benefit thereof by the aid of the court of bankruptcy, he should first prove his claim as a secured creditor.⁷⁴ He may then, by section 5075, be admitted as a creditor for the balance of the debt after deducting the value of the property subject to his lien, to be ascertained by agreement between him and the assignee, or by a sale thereof; or he may release his claim to the assignee and prove his whole debt; or he may purchase the assignee's right of redemption; or he may apply, at any time after the appointment of the assignee, to the court to have the property sold and the proceeds applied to the satisfaction of his claim.⁷⁵ The assignee may apply to the court and procure an order authorizing him to sell the property, either subject to or free from the lien.⁷⁶ In case

2 Cal. Cas. 300; *In re John McGilton*, 7 B. R. 294. But if the judgment is not, at the commencement of the bankruptcy proceedings, a perfect and valid lien by the laws of the state, it is, of course, no lien against the estate of the bankrupt. *In re McIntosh*, 2 B. R. 506; *In re Mebane*, 3 B. R. 347; *In re Cozart*, 3 B. R. 508.

⁷² *In re Weeks*, 4 B. R. 364; 2 Biss. 259; *Wilson v. Childs*, 6 Ch. L. N. 27; *Horter v. Harlan*, 5 Ch. L. N. 374; *Witt v. Hereth*, 8 Ch. L. N. 41. *Contra*, *In re Tills & May*, 11 B. R. 214.

⁷³ *In re Kerr*, 2 B. R. 388; 2 L. T. B. 39; *Swope v. Arnold*, 5 B. R. 148; *In re Hughes*, 7 Ch. L. N. 162; *In re Bernstein*, 1 B. R. 199; 2 Ben. 44; 34 How. Pr. 289; *Haughey v. Albin*, 2 B. R. 399; 2 Bond, 244; 2 L. T. B. 47; *Beers v. Place*, 4 B. R. 159; *Armstrong v. Rickey*, 2 B. R. 473; 1 Ch. L. N. 145.

⁷⁴ *In re Bigelow*, 1 B. R. 632; 2 Ben. 480; 1 L. T. B. 95.

⁷⁵ *In re Grinnell*, 9 B. R. 29; *In re T. R. Stewart*, 1 B. R. 278.

⁷⁶ *In re Barrow*, 1 B. R. 481; 1 L. T. B. 63; *In re McClellan*, 1 B. R. 289; *In re National Iron Co.*, 8 B. R. 422; 20 Pitts. L. J. 208; 30 Leg. Int. 272; *Sutherland v. L. S. C. Co.*, 9 B. R. 298; 1 Cent. L. J. 127.

the assignee wishes to sell free of all liens, he should give the lien-holders notice of his intention to apply to the court for authority so to do.⁷⁷ The funds realized from a sale made free of liens must be treated as subject to the same liens from which the property was freed for the purpose of being sold. Property sold by the assignee will be subject to all liens from which it does not clearly appear to have been freed by the order of the court.⁷⁸

SEC. 10. *Cases where Creditor may Proceed in State Court after Presenting his Judgment as a claim against the Bankrupt.*—The only provision of the statute in express terms forbidding the execution of judgments pending proceedings in bankruptcy is to be found in section 5105. By that section, “no creditor proving his debt or claim shall be allowed to maintain any suit at law or in equity therefor against the bankrupt, but shall be deemed to have waived all right of action against him; and all proceedings already commenced or unsatisfied judgments already obtained thereon against the bankrupt shall be deemed to be discharged and surrendered thereby.” While a portion of this section seems, when considered by itself, to discharge, unconditionally, those judgments which are proved as claims against the estate of the bankrupt, yet it is evident from the whole section, and from the general purpose and result of the proceedings in bankruptcy, that a judgment is not, by being proved against the bankrupt, so extinguished that it can not under any circumstances thereafter be enforced by execution. The judgment creditor may purchase the assignee’s right of redemption, or he may ask to be admitted as a creditor for so much only of his judgment as remains unpaid after deducting the value of the property as ascertained by agreement between him and the assignee; or the property may, by order of the court of bankruptcy, be sold subject to the judgment or execution lien; or the

⁷⁷ Foster v. Ames, 2 B. R. 455; 1 Lowell, 313; Ray v. Brigham, 12 B. R. 145; 25 La. An. 600; Meeks v. Whatley, 10 B. R. 498.

⁷⁸ In re McGilton, 7 B. R. 294; 3 Biss. 144; 5 Ch. L. N. 1.

property subject to the lien may have been sold by the bankrupt prior to the filing of his petition, or may, from some other cause, not vest in the assignee. In all these cases it is evident that the creditor must, where such a course is necessary to realize the fruits of his lien, be authorized to proceed in the state courts.⁷⁹ Whether the proving of a claim against a bankrupt's estate, without disclosing that it is secured, is a waiver of the security is not yet settled. A majority of the judges are certainly of the opinion that it is a waiver.⁸⁰ It has been also held "that a creditor who has a lien upon the property of his debtors, by virtue of a judgment, execution and levy, or as secured by garnishment, filing a petition for adjudication of bankruptcy without reference to such lien or security, thereby waives and relinquishes the same, and stands before the court as an unsecured creditor."⁸¹ The reasoning upon which these decisions rest is that, by concealing his security, the creditor may perpetrate a fraud on the other creditors, by obtaining in bankruptcy a dividend on his whole debt, when, if the truth were known, he could obtain a dividend only on the balance after deducting the value of the security. If from the proofs presented it appears that the debt is secured, no concealment can be justly charged on the creditor, and he ought not to be held to have waived his lien, unless he does so in express terms;⁸² and the Supreme Court of Iowa has held that the proving of a debt "as a general claim" will not be deemed a waiver of the security, unless it appears affirmatively that the creditor

⁷⁹ *Phillips v. Bowdoin*, 14 B. R. 43; *Winship v. Phillips*, 14 B. R. 51; *Jones v. Lellyett*, 39 Ga. 64; *Douglas v. St. L. Z. Co.*, 56 Mo. 388; *King v. Bowman*, 24 La. An. 506; *Cummings v. Clegg*, 14 B. R. 49; *Seibel v. Simeon*, 62 Mo. 255.

⁸⁰ *Haxtun v. Corse*, 2 Barb. Ch. 506; 4 Edw. Ch. 585; *Stewart v. Isidor*, 1 B. R. 485; 5 Abb. Pr. (N. S.), 68; *In re Stansell*, 6 B. R. 183; *In re Granger & Sabin*, 8 B. R. 30; *In re Jaycox & Green*, 8 B. R. 241; *Hoadley v. Cawood*, 40 Ind. 239; *Briggs v. Stephens*, 7 L. R. 281; *Heard v. Jones*, 56 Ga. 271.

⁸¹ *In re Bloss*, 4 B. R. 147; 2 L. T. B. 126.

⁸² *In re Brand*, 3 B. R. 324; 2 L. T. B. 66.

failed to disclose the existence of his security.⁸³ By sec. 5075⁸⁴ of the Revised Statutes a secured creditor may, on releasing or conveying his claim to the assignee, be admitted to prove his whole debt. Conceding that, under this section, the proof of a secured claim as unsecured entitles the assignee to be subrogated to the rights of the creditor, the Supreme Court of Massachusetts has held that only the assignee can invoke the benefit of the rule; and, therefore, that the creditor can, after so proving a claim secured by mortgage, enforce his lien against the mortgagee.⁸⁵

SEC. 11. *Enforcing Judgments never Presented to the Court of Bankruptcy.*—The judgments referred to in the preceding section as being discharged or surrendered, embrace those only which have been proved against the bankrupt, or which are based upon claims which have been so proved. Judgments in actions for recovery of specific property, real or personal, instituted prior to the filing of the petition, may be enforced by the form of execution appropriate to confer the relief granted thereby. The assignee is bound by the doctrine of *lis pendens* to the same extent as any other person acquiring title *pendente lite*.⁸⁶ Or, in other words, he acquired the estate of the bankrupt, subject to pending suits affecting the title thereto. We come now to a more difficult question, that of the rights of a judgment creditor who does not choose to present his claim against the estate of the bankrupt, preferring rather to seek its enforcement in the state courts. If such creditor had no valid lien against such estate when the petition was filed, then it is clear that he has no temptation to proceed in the state courts; for he can not there create any lien or claim against the estate after the commencement of the proceedings in bankruptcy. But if he has a lien,

⁸³ Hatch v. Seely, 13 B. R. 380.

⁸⁴ Sec. 20 of Act of 1867.

⁸⁵ Cook v. Farrington, 104 Mass. 212.

⁸⁶ Baum v. Stern, 1 Rich. (N. S.) 415; Eyster v. Gaff, 13 B. B. 546; 8 Ch. L. N. 177; 1 Otto, 521; 3 Cent. L. J. 250.

valid in both the national and state courts, he may desire to enforce it in the latter rather than in the former. May this desire be gratified? and, if so, when and how? Many cases may be found in which the general assertion is made that all liens against the estates of bankrupts must be enforced in the courts of bankruptcy.⁸⁷ There is certainly nothing in the statute which directly points to this result. The statute nowhere declares that the adjudication of bankruptcy shall, of itself, operate as a prohibition against the assertion of pre-existing liens in the state courts. When the courts of bankruptcy assumed that the mere adjudication of bankruptcy brought the bankrupt and all his assets so exclusively within their jurisdiction that no one could lawfully, even in the absence of any special inhibition, pursue his legal remedies elsewhere, they arrogated an authority which was founded rather upon their notions of what the Bankrupt Act ought to have done, than upon what it professed to do. The Supreme Court of the United States has, however, on each recurring opportunity, curbed the unsupported pretensions of the subordinate tribunals. It has insisted upon that interpretation which, without sacrificing the objects of the statute, would concede due respect both to the state and the national authorities, and would avoid needless collision between them. These principles have long been established, "that where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right can not be arrested or taken away by proceedings in another court;"⁸⁸ and that where property has been taken into the possession of the officers of a court, it does not allow such possession "to be disturbed

⁸⁷ *Blum v. Ellis*, 73 N. C. 293; 13 B. R. 345; 8 Ch. L. N. 162; *Taylor v. Bonnett*, 38 Tex. 521; *In re Bridgman*, 2 B. R. 252; *In re Bigelow*, 1 B. R. 632; *In re Ruehle*, 2 B. R. 577; *In re Frizelle*, 5 B. R. 122; *Stuart v. Hines*, 6 B. R. 416; *In re Hufnagel*, 12 B. R. 556; *In re Whipple*, 13 B. R. 373; *In re Brinkman*, 7 B. R. 421; *Davis v. Anderson*, 6 B. R. 145; *Boone v. Revis*, 44 Tex. 384.

⁸⁸ *Peck v. Jenness*, 7 How. U. S. 625; *Payne v. Drewe*, 4 East, 523; *Taylor v. Carryl*, 20 How. U. S. 583.

by a party, whether claiming by title paramount or under the right which they were appointed to protect, as their possession is the possession of the court."⁸⁹ By the proper application of these two principles, most of the questions of conflict between the state and national authorities concerning proceedings against the estates of bankrupts may be correctly determined. If an action to enforce a lien against specific property is pending in a state court when the petition in bankruptcy is filed, such court is not thereby divested of its jurisdiction over the action. In such a case, if the plaintiff proves his claim against the bankrupt, "the proceedings already commenced" thereon are by section 5105 "deemed to be discharged." If, on the other hand, the plaintiff does not prove his debt in bankruptcy, the suit may be stayed until the question of the defendant's discharge is determined, provided there is no unreasonable delay in endeavoring to procure it.⁹⁰ The assignee may also be admitted to defend the suit. But the state court can not be divested, through the action of the bankruptcy courts, of its ultimate right to determine that suit, and all the issues therein which it would have been competent to determine if no petition in bankruptcy had been filed.⁹¹ Hence, if an action to foreclose a lien and obtain the sale of property is pending when the proceedings in bankruptcy are commenced, it may lawfully continue to judgment; and a sale under such judgment will vest a title in the purchaser, taking effect by relation at the inception of the lien, and thereby divesting the title of the assignee. This result will be accomplished, whether the assignee was made a party to the proceeding or not. He shares the same fate as any other person acquiring an interest *pendente lite*.⁹² If the

⁸⁹ Taylor v. Carryl, 20 How. U. S. 594; Noe v. Gibson, 7 Paige, 513.

⁹⁰ See Sec. 5106.

⁹¹ Sampson v. Burton, 4 B. R. 1; 5 Ben. 325; Stone v. B. N. Bank, 39 Ind. 284; *In re Clarke*, 3 B. R. 491; 4 Ben. 88; Clark v. Binninger, 5 B. R. 255; 39 How. Pr. 363; *In re Wynne*, 4 B. R. 28; 2 L. T. B. 116; 9 A. L. Reg. (N. S.) 627.

⁹² Eyster v. Gaff, 13 B. R. 546; 8 Ch. L. N. 177; 1 Otto, 521; 3 Cent. L. J. 250.

state court has possession of property, either by its receiver,⁹³ or by a sheriff under the levy of a valid execution,⁹⁴ its possession can not be disturbed. In the latter case the sheriff should proceed to sell the property, and turn over to the creditor so much of the proceeds as is necessary to satisfy the lien of the levy.⁹⁵ So, if the property be in the possession of an officer of the court under an attachment on *mesne* process levied more than four months prior to the filing of the debtor's petition, the court should retain possession, enter a judgment for the sale of the property, and its officer should execute such judgment.⁹⁶ When, however, a state court has not the possession of the estate of the bankrupt, but such estate is subject to a valid judgment or execution lien, a more difficult question arises. In such a case it is claimed, with a great deal of force, that the property, by vesting in the assignee, becomes *in custodia legis*; and, therefore, upon well-settled principles, can not be subjected to any interference not sanctioned by the court of bankruptcy.⁹⁷ Where the property subject to the lien is exempt from the operation of the Bankrupt Act,⁹⁸ or has been sold by the debtor before filing the petition,⁹⁹ or, from any other cause, does not vest in the assignee, the claim that it

⁹³ *Davis v. R. R. Co.*, 13 B. R. 258; 1 Woods, 661; *Myer v. C. L. & P. W.*, 14 B. R. 9; *Sedgwick v. Menck*, 1 B. R. 675; 6 Blatchf. 156; *Appleton v. Bowles*, 9 B. R. 354; 2 N. Y. Supr. Ct. 568; 6 Ch. L. N. 192; *In re Clark & Binninger*, 3 B. R. 491; 4 Ben. 88. *Contra*, *In re Whipple*, 6 Biss. 516; 13 B. R. 373.

⁹⁴ *Townsend v. Leonard*, 3 Dill. 370; *Bradley v. Frost*, 3 Dill. 457; *Marshall v. Knox*, 8 B. R. 97; 16 Wall. 551; *In re Smith & Smith*, 1 B. R. 599; *Wilson v. Childs*, 6 Ch. L. N. 27; *In re W. H. Shuey*, 6 Ch. L. N. 248; *In re Weamer*, 8 B. R. 527; *Allen v. Montgomery*, 48 Miss. 101; *Thompson v. Moses*, 43 Ga. 383; *O'Brien v. Weld*, 2 Otto, 81.

⁹⁵ *Sharman v. Howell*, 40 Ga. 257; 2 Am. Rep. 576; *Parks v. Sheldon*, 36 Conn. 466; 4 Am. Rep. 95, and the authorities in the last citation.

⁹⁶ See citation No. 33.

⁹⁷ *Marshall v. Haney*, 12 B. R. 484; 4 B. R. 510; 1 Dill. 497; *Davis v. Anderson*, 6 B. R. 145; *Turner v. The Skylark*, 6 Ch. L. N. 239.

⁹⁸ *Cummings v. Clegg*, 14 B. R. 49; *Robinson v. Wilson*, 15 Kas. 595; *Bush v. Lester*, 15 B. R. 36.

⁹⁹ *Jones v. Lellyett*, 39 Ga. 64; *Winship v. Phillips*, 52 Ga. 593.

becomes *in custodia legis* by virtue of the proceedings in bankruptcy is certainly unfounded. It may, therefore, be sold under process issued out of a State court. So, after the proceedings in bankruptcy have terminated, either by the discharge¹⁰⁰ of the bankrupt, or by the refusal of such discharge,¹⁰¹ we do not doubt that the creditor may enforce his lien in the state court; for in either of these cases it is certain that the property, if ever *in custodia legis*, has ceased to be so. Except in the state of Louisiana, levies are made upon real estate without disturbing the possession of the defendant.¹⁰² In fact, no authority for such disturbance exists until after the sale is made, and, in most cases, not until the purchaser's title has become absolute by reason of the expiration of the statutory period allowed for redemption. The levy upon lands does not create any special property in the levying officer, as is the case when personalty is seized under execution. And we do not understand that a levy upon real estate places it in the custody of the law in any of those states whose statutes give no authority for wresting it from the custody of the defendant. But we think it must be conceded that the levy of an execution upon real estate confers authority upon the officer to proceed, notwithstanding the subsequent bankruptcy of the defendant, to make the levy productive by a sale of the property.¹⁰³ Where, however, no levy has been made prior to the filing of the petition, quite a number of authorities may be produced to support the proposition that a subsequent sale is void, though supported by a valid execution or judgment lien.¹⁰⁴ Some of these authorities are

¹⁰⁰ *Cole v. Duncan*, 58 Ill. 176; *Reed v. Bullington*, 49 Miss. 223; 11 B. R. 408; *Truitt v. Truitt*, 38 Ind. 16; *Pierce v. Wilcox*, 40 Ind. 70; *Second N. B. v. N. S. B. of Newark*, 7 Ch. L. N. 70; 11 B. R. 49; 14 A. L. Reg. (N. S.) 281; *Payne v. Able*, 4 B. R. 220; 7 Bush, 344; *Wicks v. Perkins*, 13 B. R. 280. *Contra*, *Johnson v. Poag*, 39 Tex. 92; *Stemmons v. Burford*, *Id.* 352.

¹⁰¹ *Dingee v. Becker*, 9 B. R. 508; 31 Leg. Int. 156.

¹⁰² *Freeman on Executions*, sec. 280.

¹⁰³ *Goddard v. Weaver*, 6 B. R. 440; *Thompson v. Moses*, 43 Ga. 383; *Maris v. Duron*, 1 Brews. 428; *Norton v. Boyd*, 3 How. U. S. 426.

¹⁰⁴ *Davis v. Anderson*, 6 B. R. 145; *Turner v. The Skylark*, 6 Ch. L. N.

founded upon the theory that the state courts have no power whatever to enforce a lien against the estate of a bankrupt; and some upon the theory that, by virtue of the bankruptcy and the assignment in pursuance thereof, the property is in custody of the law. The first theory can not be sustained. Let us, therefore, proceed to examine the second. The title of the bankrupt is not divested by the filing of the petition, nor by the adjudication of bankruptcy.¹⁰⁵ The judge or register must make a written transfer to the assignee. The assignee acquires no title to, nor authority over, any property not embraced in the transfer. "The assignment is not a precept issued by the court, but a conveyance of the bankrupt's property, giving the assignee the mere rights of ownership, but no authority or color of authority to take the property of strangers.¹⁰⁶ Hence, if he takes property which did not belong to the bankrupt, his acts are not those of an assignee, but those of a trespasser.¹⁰⁷ We shall show that the court of last resort, so far as it has expressed any opinion on the subject, considers the title of the assignee to be very similar to that of a grantee under a voluntary conveyance. Thus, Mr. Justice Hunt, in delivering the opinion of the Supreme Court of the United States, in the case of *Valliant v. Childress*,¹⁰⁸ said: "The conveyance of the register operates as would, under ordinary circumstances, the deed of a person having the title, with two differences: first, it relates back to the commencement of the bankruptcy proceeding; secondly, the register's conveyance dissolves any attachment that has been made within four months previous to the bankruptcy proceedings." These views are sub-

239; *Blum v. Ellis*, 13 B. R. 345; 8 Ch. L. N. 162; *Phelps v. Sellick*, 8 B. R. 390; *Stemmons v. Burford*, 39 Tex. 352.

¹⁰⁵ Rev. Stats., sec. 5044.

¹⁰⁶ *Leighton v. Harwood*, 111 Mass. 67; 15 Am. Rep. 4.

¹⁰⁷ *Leighton v. Harwood*, 111 Mass. 67; 15 Am. Rep. 4; *Edge v. Parker*, 8 B. & C. 697. As to remedy against U. S. Marshals in like cases, see *Marsh v. Armstrong*, 20 Minn. 81; *Mollison v. Eaton*, 16 Minn. 426; 10 Am. Rep. 150; *Hill v. Fleming*, 39 Ga. 662.

¹⁰⁸ 11 B. R. 319.

stantially identical with those subsequently expressed in the same court by Mr. Justice Miller, in the case of *Eyster v. Gaff*.¹⁰⁹ If the differences here suggested between a register's conveyance and that of an ordinary conveyance by a person having the title are the only differences that really exist, then it follows that the grantee takes title subject to its being divested by a sale under a pre-existing judgment or execution lien against his predecessor in interest. If the lien be based on an attachment levied upon real estate over four months prior to the filing of the petition in bankruptcy, no doubt such real estate may be sold under a writ subsequently issued out of the state court.¹¹⁰ We see no reason supporting such a sale, which does not apply with equal force to a sale under a judgment lien. In neither case is the property in the possession of the state court. In both cases the property is subject to a lien which is not extinguished by the bankruptcy of the defendant, and which needs no further levy to make it perfect. The Supreme Court of Pennsylvania has affirmed the right of the holder of a judgment lien to sell real estate pending proceedings in bankruptcy, although no levy had been made prior to the commencement of such proceedings.¹¹¹ This position is well fortified by the decisions made under the Bankrupt Act of 1841;¹¹² and we judge that it will in due time be equally well sustained by the judgment of the court of last resort declaring the true meaning of the present statutes of the United States.

SEC. 12. *Enjoining Proceedings in State Courts.*—In what has been said in the preceding section about the right of judgment creditors to proceed in state courts, we have as-

¹⁰⁹ 8 Ch. L. N. 177; 13 B. R. 546; 1 Otto, 521; 3 Cent. L. J. 250.

¹¹⁰ *Doe v. Childress*, 7 Ch. L. N. 201; 21 Wall. 642; *Daggett v. Cook*, 37 Conn. 341; *Bates v. Tappan*, 99 Mass. 376; 3 B. R. 647; *Valliant v. Childress*, 11 B. R. 319; *Peck v. Jenness*, 7 How. U. S. 612.

¹¹¹ *Fehley v. Barr*, 66 Penn. St. 196; *Reeser v. Johnson*, 76 Penn. St. 313; 10 B. R. 467; see also *Reed v. Bullington*, 11 B. R. 408; 49 Miss. 223.

¹¹² *Savage v. Best*, 3 How. U. S. 111; *McCance v. Taylor*, 10 Gratt. 580; *Russell v. Cheatham*, 8 S. & M. 703; *Talbert v. Melton*, 9 S. & M. 27.

sumed that such right was not exercised in defiance of any direct prohibition from the courts of bankruptcy. We shall now consider the power and propriety of the last-named courts enjoining proceedings in the first-named. The express authority granted by the Bankrupt Act to issue injunctions is that conferred by section 5024 of the present Revised Statutes. That section refers to involuntary or compulsory proceedings, and provides that "the court may, by injunction, restrain the debtor, or any other person," from making any transfer or disposition of any part of the debtor's property. But this injunction is only to be operative from the filing of the petition until the adjudication of bankruptcy can be had.¹¹³ At the time the Bankrupt Act was passed, a statute had long been in force expressly forbidding the national courts from restraining proceedings in the state courts.¹¹⁴ This pre-existing statute, taken in connection with the significant circumstance that the Bankrupt Act, where it did mention injunctions, provided for their issuing in a specified case and then to remain in force but a limited time, fully justified, as we think, those decisions which denied the right of the courts of bankruptcy to enjoin proceedings in the state courts.¹¹⁵ Section 4972, among other things, confers jurisdiction upon the district courts as courts of bankruptcy, to collect all assets of the bankrupt; to ascertain and liquidate all liens and claims thereon; to

¹¹³ *Creditors v. Cozzens*, 3 B. R. 281; 2 W. Jur. 349; 17 Pitts. L. J. 236; *Irving v. Hughes*, 2 B. R. 62; 7 A. L. Reg. (N. S.) 209; *In re Kintzing*, 3 B. R. 217; *In re Metzler*, 1 B. R. 38; 1 Ben. 356; *In re Moses*, 6 B. R. 181; *In re Irving*, 14 B. R. 289.

¹¹⁴ Sec. 5 of Act of Congress of March 2, 1793, among other provisions, contained the following: "Nor shall a writ of injunction be granted to stay proceedings in any court of a state." The corresponding section in the present Revised Statutes is as follows: "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by the law relating to proceedings in bankruptcy." R. S. of U. S., sec. 720.

¹¹⁵ *In re Hugh Campbell*, 1 B. R. 165; 1 Abb. C. C. 185; 1 L. T. B. 30; 3 Pitts. L. J. 96; *In re S. M. Burns*, 1 B. R. 174; 7 A. L. Reg. (N. S.) 105; 24 Leg. Int. 357; 3 Pitts. L. J. 107; *Tenth N. B. v. Sanger*, 42 How. P. 179.

adjust the various priorities and conflicting interests of all parties; and to marshal and dispose of the different funds and assets so as to secure the rights of all parties and a due distribution of the assets. These powers are very extensive, and must, in many instances, be invoked when great promptitude of action is required. Proceedings in the state courts, if permitted to continue, would frequently so dispose of the bankrupt's assets that the courts of bankruptcy could not adequately assert the jurisdiction conferred by this section. Hence, the last-named courts have so frequently asserted their authority to suspend proceedings in the state courts when such suspension appeared necessary to accomplish the objects sanctioned by section 4972, that probably Mr. High is fully justified in his assertion that "the jurisdiction of the United States courts, sitting in bankruptcy, to restrain proceedings in the state courts against the estate of a bankrupt, though sometimes questioned, may be regarded as too clearly settled to admit of doubt."¹¹⁶ While conceding the decisive preponderance of the authorities, we are by no means convinced of their soundness, and, whether sound or not, we feel assured that the power which they affirm ought to be sparingly exercised.¹¹⁷ In the first place, we question the existence of that imperative necessity upon which the

¹¹⁶ *High on Injunctions*, § 208; *In re Mallory*, 6 B. R. 22; 1 Saw. 88; *Jones v. Leach*, 1 B. R. 595; *In re Barrow*, 1 B. R. 481; *Lady Bryan M. Co.*, 6 B. R. 252; *Kerosene Oil Co.*, 3 B. R. 125; 3 Ben. 35; 6 Blatch. 521; *In re Snedaker*, 3 B. R. 629; *Markson v. Heaney*, 4 B. R. 510; 1 Dill. 497; *Whitman v. Butler*, 8 B. R. 487; *Pennington v. Sale*, 1 B. R. 572; *Hyde v. Bancroft*, 8 B. R. 24; 6 Ben. 392; *Irving v. Hughes*, 2 B. R. 62; 7 A. L. Reg. (N. S.) 209; *In re Wallace, Deady*, 433; 2 B. R. 52; *Iron M. Co.*, 9 Blatch. 320; *In re Atkinson*, 7 B. R. 143; 5 Am. L. T. 320; 3 Pitts. L. J. 423; *In re Shuey*, 6 Ch. L. N. 248.

¹¹⁷ Our opinion that injunctions to restrain proceedings in state courts ought not to be needlessly granted, and, when granted, ought not to extend any farther than is essential to the protection of the interests of the general creditors, is sustained by the authorities. *In re Davis*, 8 B. R. 167; 1 Saw. C. C. 260; *Goddard v. Weaver*, 6 B. R. 440; *Eastburn v. Yardly*, 8 Pac. L. R. 127; 30 Leg. Int. 404; *Iron M. Co.*, 9 Blatch. 320; *In re Wilbur*, 3 B. R. 71; *High on Injunctions* § 214; *In re Hanna*, 4 B. R. 411; *In re Brinkman*, 6 B. R. 541.

issuing of injunctions to restrain proceedings in the state courts has been maintained. It by no means follows, because very extensive powers are granted to the bankruptcy courts in regard to marshalling assets, adjusting priorities, and liquidating liens and claims, that those powers must be supported by the further power to issue injunctions. On the contrary, it ought to be assumed that the state courts would act in full accord with the national courts, and would yield a voluntary submission to the authority of the latter. The statutes of the United States in regard to bankruptcy are addressed to the state, as well as to the national courts, and must, of necessity, be invoked, interpreted, and enforced in the former as well as in the latter; the decision of the state courts being, however, subject to review in certain cases by the Supreme Court of the nation. The court from which process to enforce a judgment is issued has such perfect control thereof that it may, for any proper cause, set it aside, or may stay it either temporarily or permanently, as may be requisite to prevent any abuse thereof.¹¹⁸ If this be true, why resort to the extraordinary and somewhat offensive remedy by injunction. If proceedings have been instituted, or are about to be instituted, to test the validity of the judgment; or if the judgment, though valid, can not be enforced in the state court without undue sacrifice of the bankrupt's assets; or if, from any cause whatever, an emergency arises in which, in aid of the proceedings in bankruptcy, it is proper that execution should be stayed, either temporarily or permanently,—why not disclose the fact to the state court, and in it procure the requisite relief? In defense of injunctions against litigants in state courts, it was claimed that, because these injunctions did not assume in direct terms to restrain *the courts*, they were not forbidden by the Act of 1793, before referred to. But surely statutes are not enacted with the view of preserving matters of form, and permitting the sacrifice of matters of substance. Every act ought to be characterized by the result which it accomplishes, and which

¹¹⁸ Freeman on Executions, Sec. 32.

it was designed to accomplish, rather than by the deceptive guise in which it is sought to be perpetrated. The difference between destroying a court and prohibiting all litigants from resorting to it for redress is, in the eyes of justice, an immaterial difference. By conceding the right to enjoin the litigants from proceeding in a particular action, we, in effect, concede the right to enjoin the court from so proceeding.

SEC. 13. *The Effect of a Discharge in Bankruptcy* is, by the statute, declared to be the release of the bankrupt from the liabilities which were or might have been proved against his estate.¹¹⁹ The debts of the bankrupt are not, however, in fact paid; nor are they so extinguished in conscience, that they can not be a sufficient consideration for a new promise.¹²⁰ In the case of a judgment, within the operation of a discharge in bankruptcy, it is evident that no proceedings can properly be taken to enforce any personal liability against the bankrupt; but the lien of the judgment, if the plaintiff has done nothing to waive it, still exists and may be enforced. A discharge in bankruptcy does not release liens which were valid at the inception of the proceedings.¹²¹ Hence, a judgment creditor may redeem real estate, by virtue of his judgment lien, after the defendant has been adjudged a bankrupt.¹²²

SEC. 14. *The Method of Making a Discharge Available*, when a bankrupt is pursued by an action, is by pleading it in bar. "It may be pleaded by a simple averment that,

¹¹⁹ A discharge takes effect as of the date of the filing of the bankrupt's petition. *Turner v. Gatewood*, 8 B. Mon. 613; *Mosby v. Steele*, 7 Ala. 299. It does not, therefore, protect him from liabilities incurred pending the proceedings in bankruptcy. *Robinson v. Pesant*, 53 N. Y. 419; 8 B. R. 426; *Sparhawk v. Broome*, 6 Binn. 256; *Savory v. Stocking*, 4 Cush. 607; *Stinemets v. Ainslie*, 4 Den. 573.

¹²⁰ *Dusenbury v. Hoyt*, 10 B. R. 313; 53 N. Y. 521; 14 Abb. Pr. (N. S.) 132; *Barron v. Benedict*, 44 Vt. 518; *Apperson v. Stewart*, 27 Ark. 619.

¹²¹ *Elliott v. Booth*, 44 Tex. 180; *Bush v. Lester*, 55 Ga. 579; 15 B. R. 36; *Robinson v. Wilson*, 15 Kas. 595; *Truitt v. Truitt*, 38 Ind. 16; *Barber v. Terrell*, 54 Ga. 146; *Boone v. Revis*, 44 Tex. 384.

¹²² *Trimble v. Williamson*, 14 B. R. 53; 49 Ala. 525.

on the day of its date, such discharge was granted to the bankrupt, setting a full copy of the same forth in its terms.''¹²³ If a judgment has been entered against a bankrupt, by default, after his discharge, it may, on seasonable application, be vacated on such terms as may be just, for the purpose of permitting him to interpose the discharge as a defense.¹²⁴ The true rule seems to be that this defense will be treated like any other meritorious defense. Courts will set aside defaults, or judgments by default, in order to let it be pleaded, provided the application is not too tardily made and the applicant has not been guilty of gross laches. If the failure to interpose the plea in due time was the result of some fraud or trick on the part of the plaintiff, certainly the defendant would be relieved from the unconscionable acts of his adversary.¹²⁵ If, on the other hand, the defendant has no excuse sufficient to account for his disregarding the process of the court, and failing to make his proper defense, then he will not be treated with any special leniency on account of his defense being founded on his discharge in bankruptcy.¹²⁶ In some cases it is said that, where a discharge has been granted, a plaintiff claiming that his judgment is not within the operation of the discharge must not issue an execution without first making an application to the court and obtaining leave so to do.¹²⁷ But, in many cases, the plaintiff is ignorant of the existence of the discharge, and from this, and other causes, it must frequently happen that executions will issue on judgments which are unquestionably discharged. Some authorities evidently incline to the view that a writ so issued is voidable and not void; and that the defendant, to escape its effect, must take some affirmative measures to procure

¹²³ Sec. 5119, Rev. St. of U. S.; Sec. 34 of Act of 1867; *Stoll v. Wilson*, 14 B. R. 571.

¹²⁴ *Savings Bank v. Webster*, 48 N. H. 21; *Lee v. Phillips*, 6 Hill, 246.

¹²⁵ *Park v. Casey*, 35 Tex. 536; *Manwarring v. Kouns*, 35 Tex. 171.

¹²⁶ *Rudge v. Rundle*, 1 N. Y. Supr. Ct. 649; *Manwarring v. Kouns*, 35 Tex. 171.

¹²⁷ *Alcott v. Avery*, 1 Barb. Ch. 347; *Francis v. Ogden*, 22 N. J. L. 210.

its vacation or to prevent its execution.¹²⁸ On the other hand, it has been determined by the Court of Appeals in New York that a judgment which has been released by operation of a discharge in bankruptcy is, in legal effect, satisfied; and that the plaintiff can not justify the issuing and levy of a writ thereunder, although he acted in ignorance of the existence of the discharge.¹²⁹ Such a writ being regular on its face would, however, justify an officer who innocently undertook to execute it. Unquestionably the safest course for a discharged bankrupt, having judgments ostensibly in force against him, is to take some affirmative action for the purpose of securing the benefit of his discharge. Formerly matters of discharge, occurring subsequent to the rendition of a judgment, were brought to the attention of the court by proceeding by writ of *audita querela*.¹³⁰ In the United States this remedy has fallen into desuetude. The usual method of securing the benefit of a discharge in bankruptcy is by motion to the court wherein the judgment is. This court will, in a proper case, set aside any writ which has been issued, and will grant a perpetual stay of proceedings.¹³¹ In some instances relief has been obtained by injunction.¹³² This character of relief ought usually to be denied; for, unless in very exceptional cases, the remedy at law is both speedy and adequate.

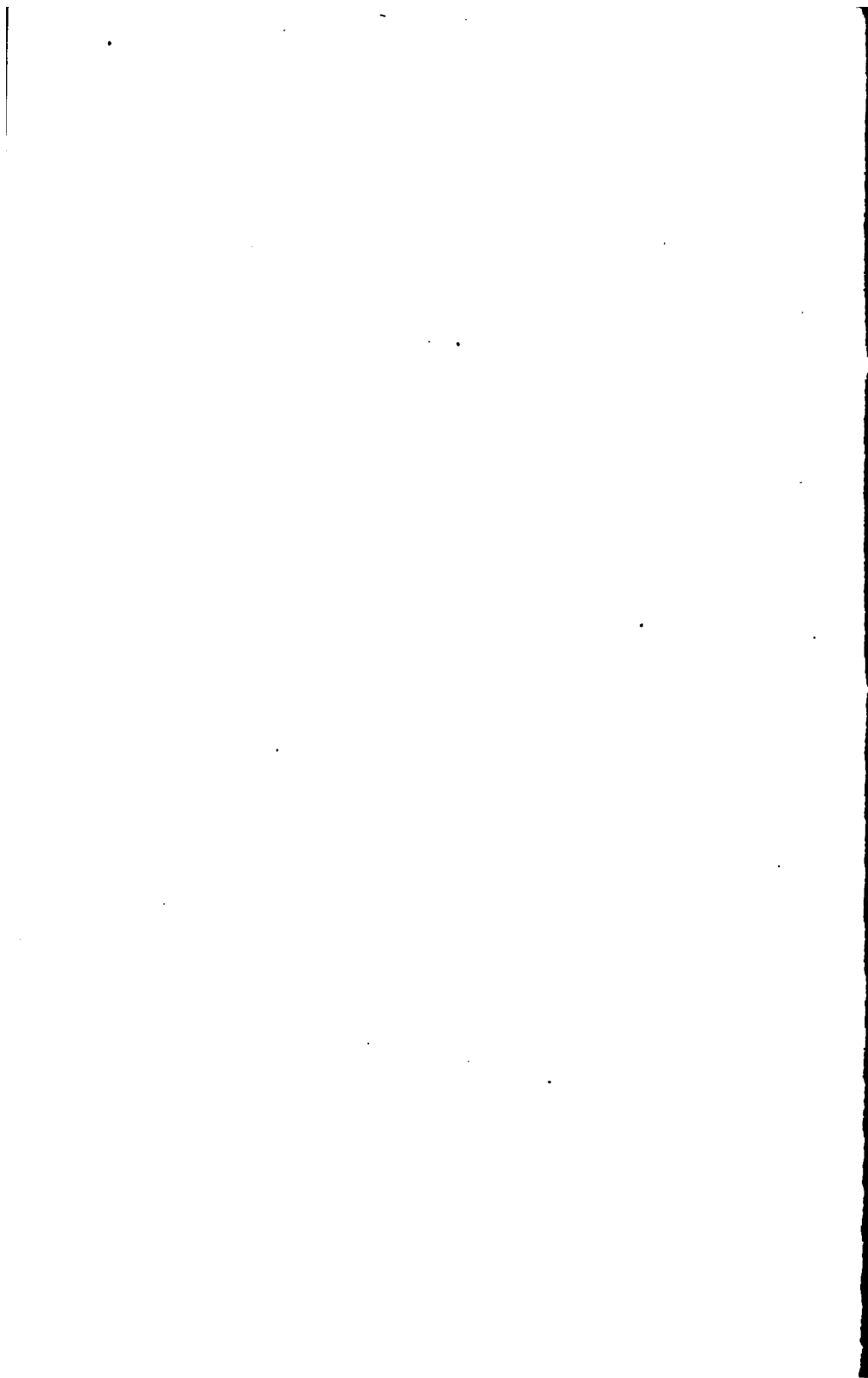
¹²⁸ *Cogburn v. Spence*, 15 Ala. 549; *Roden v. Jaco*, 17 Ala. 344; *Westenberger v. Wheaton*, 8 Kas. 169. In the last-named case it is held that a discharged bankrupt can not maintain an action of replevin for goods levied upon by a sheriff under a discharged judgment.

¹²⁹ *Ruckman v. Cowell*, 1 N. Y. 505.

¹³⁰ *Freeman on Judgments*, Sec. 95.

¹³¹ *Linn v. Hamilton*, 34 N. J. L. 305; *Chambers v. Neal*, 13 B. Mon. 256; *Monroe v. Upton*, 50 N. Y. 593; 6 Lans. 255; *Cornell v. Dakin*, 38 N. Y. 253; *Thomas v. Shaw*, 2 Cinn. 97.

¹³² *Murphy v. Smith*, 22 La. An. 441.



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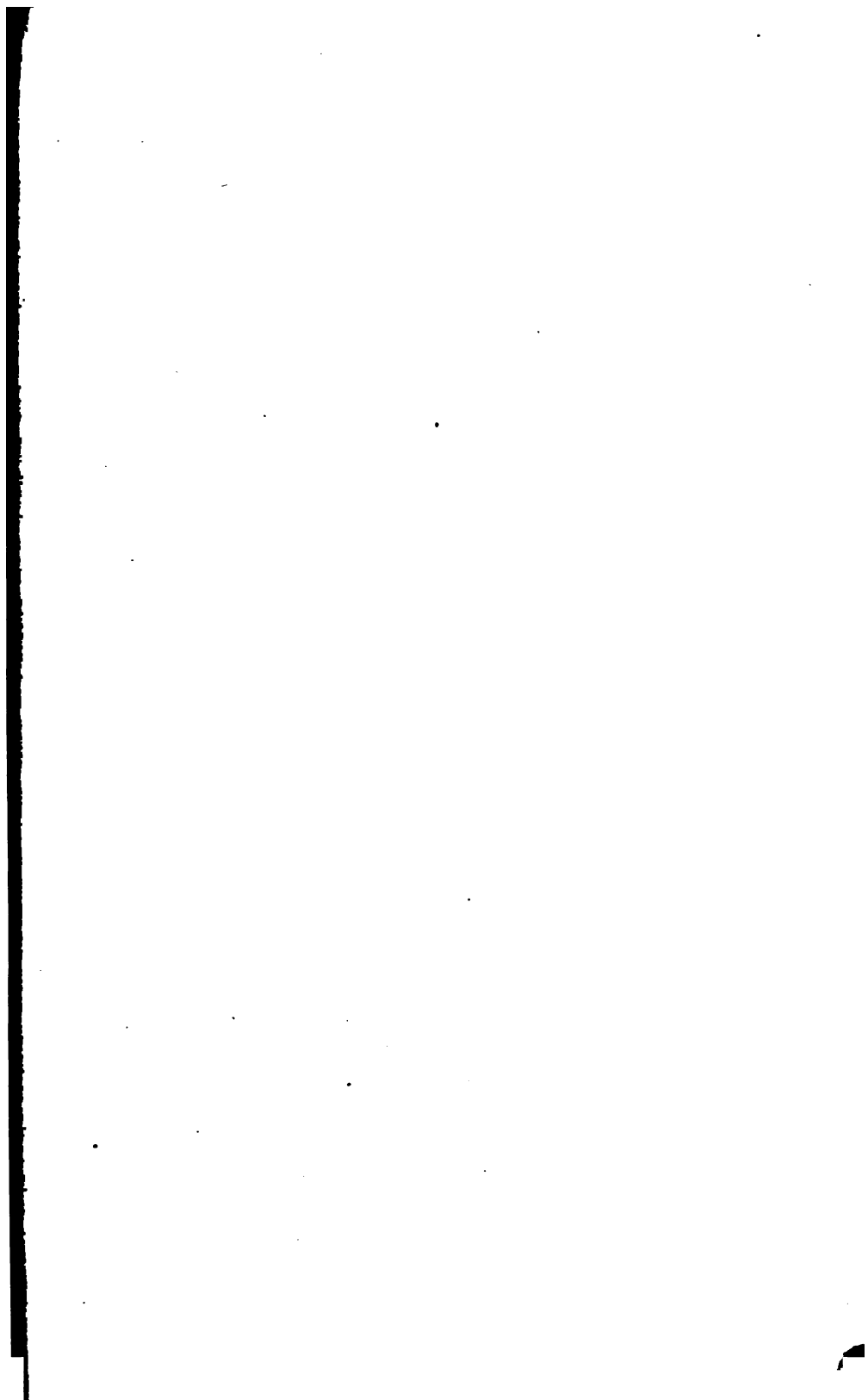
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REMOVAL OF CAUSES

FROM

STATE COURTS TO FEDERAL COURTS,

*With Forms Adapted to the Several Acts of
Congress on the Subject.*

SECOND AND REVISED EDITION.

BY JOHN F. DILLON,

CIRCUIT JUDGE OF THE EIGHTH JUDICIAL CIRCUIT, AUTHOR OF A TREATISE
ON "MUNICIPAL CORPORATIONS," ETC.

ST. LOUIS:
THE CENTRAL LAW JOURNAL.
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PUBLISHER'S PREFATORY NOTE.

The editor of the SOUTHERN LAW REVIEW requested the author to prepare, for that magazine, a practical paper on the Removal of Causes from State Courts to Federal Courts, under the principal statutes of Congress on that subject. The article was accordingly written, and appeared in the SOUTHERN LAW REVIEW for July, 1876. An extra edition of several hundred copies was separately struck off, and was speedily exhausted. At the request of the present publisher, the author of the Tract has revised and enlarged it, bringing into view more fully the State Court decisions, adding the decisions of the Federal Courts down to date, a Table of Cases and of Contents, an Index and an Appendix of Forms. This will make it more convenient and useful to the profession, for whose benefit it was originally written, and is now republished.

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REMOVAL OF SUITS

From State Courts to Federal Courts.

SECTION I.

THE FEDERAL JUDICIAL SYSTEM—ITS GROWTH AND IMPORTANCE.

The Act of September 24, 1789 (1 Stats. at Large, 79), styled by way of eminence the Judiciary Act, was passed the same year in which the Constitution went into effect, and organized the National or Federal Judicial System, substantially as it exists to-day. No structural changes have since been made in that system, and considering the complex and highly artificial nature of the Federal jurisdiction, the Judiciary Act is justly to be regarded as one of the most remarkable instances of wise, sagacious, thoroughly considered legislative enactments in the history of the law. But while the National Judicial System as established by that act remains without organic changes, yet changes of a minor, though important character have been made from time to time. This has been done, however, without disturbing the nice adjustments and skillful arrangements of the original plan. The system of 1789 is, in form and essence, the system of 1876. If we consider the intricate nature of the relations of the Federal and State governments; that each has a judicial system of its own; that the two classes of courts sit in the same territory, and exercise day by day jurisdiction over the same subjects and the same

persons ; that the judicial system provided by the Judiciary Act was untried and experimental ; that serious conflicts between the State and Federal courts have been almost wholly avoided ; that the Judiciary Act remains, after the lapse of nearly a century, almost intact,—it will appear that the admiration with which it has been regarded by statesmen, lawyers and judges, is not undeserved. And the changes which have been made are those which have been demanded by convenience, by the increase of the population and business of the country, and, during and since the War of the Rebellion, by circumstances brought about by that unanticipated event, and they are not changes made necessary by want of foresight in the great minds which devised and enacted the original scheme. The altered condition of the country has made still further changes, or rather *enlargements*, of the plan necessary, such as, for example, an intermediate court of appeals, for the relief of the Supreme Court and the convenience of suitors, and more judicial force in the districts, etc. ; but it is not the purpose of this paper to enter upon this topic.

The amendments to the Judiciary Act made from time to time by Congress concerning the Federal courts, and notably those made during and since the Rebellion, have tended uniformly in one direction, namely, an enlargement of their jurisdiction. And the recent act of March 3, 1875, in connection with the legislation then existing, has amplified the Federal judicial power almost to the full limits of the constitution. The history of the Federal jurisdiction is one of constant growth ; slow, indeed, during the first half-century and more, but very rapid within the last few years. For various reasons, which we need not stop to indicate, the small tide of litigation that formerly flowed in Federal channels has swollen into a mighty stream. Certain it is that of late years the importance of the Federal courts has rapidly increased, and that much, perhaps most, of the great litigations of the country is now conducted in them. This is noticeably so in the Western states. These observations

have been made, because they are a fitting introduction to the special topic we have placed at the head of this article,—*Removal of Causes from the State Courts*. They have, indeed, been suggested by that topic; for, as will be seen as we proceed, the limited right in this regard given by the Judiciary Act has been enlarged from time to time, until a very considerable portion of the contested cases in the Federal courts now reach them through this channel.

The editor of the *SOUTHERN LAW REVIEW*, in consequence of the recent changes in the legislation on this important subject, and the uncertainty which many lawyers suppose to surround it in consequence of those changes, has requested the writer to prepare a practical article which shall exhibit the present state of the law concerning the *Right* to removal and the *Mode* of making that right available.

The cognizance over cases removed to the Federal court has sometimes been referred to the *appellate* jurisdiction, on the ground that, as the suit is not instituted in the Federal court by original process, the jurisdiction of that court must be appellate;¹ but Mr. Justice Nelson accurately characterized the jurisdiction in such cases "original jurisdiction, acquired indirectly by a removal from the State court."²

SECTION II.

THE PRINCIPAL STATUTES ON THE SUBJECT OF REMOVALS— ACTS OF 1789, 1866, 1867 AND 1875.

There are some statutes giving the right of removal in special cases which we shall only mention generally, such as the right to remove causes, civil and criminal, in any State court, against persons denied *Civil Rights*,³ and suits, civil

¹ *Martin v. Hunter's Lessee*, 1 Wheat. 304, 349, 350.

² *Dennistoun v. Draper*, 5 Blatchf. 336; *Fisk v. U. P. R. R. Co.*, 6 Blatchf. 362, 367.

³ U. S. Rev. Stats., secs. 641, 642, construed. *State v. Gaines*, 2 Woods C. C. 342, (1874); *Gaughan v. N. W. Fertilizing Co.*, 3 Bissell, 485, (1873); *Fowlkes v. Fowlkes*, 8 Chicago Legal News, 41; *Commonwealth v. Artman*, 3 Grant (Pa.), 436; *Hodgson v. Milward*, 3 Grant (Pa.), 418.

and criminal, against *Revenue Officers* of the United States, and against officers and other persons acting under the *Registration Laws*; ⁴ and suits by *Aliens* against *Civil Officers* of

⁴ Rev. Stats., title XXVI, "The Elective Franchise." Rev. Stats., sec. 643.

Act of March 2, 1833 (4 Stats. at Large, 633), known as the "*force act*." This act provided for the removal of suits and prosecutions commenced in a court of any state, against any officer of the United States, for any act done under the *revenue* laws of the United States, or under color thereof. See Rev. Stats., sec. 643. This statute, as re-enacted, applies to the removal of *revenue cases* under "*any revenue law of the United States*." Rev. Stats., sec. 643. It was previously held to be in force as to removal of revenue cases, except those arising under the internal revenue system. *Peyton v. Bliss*, 1 Woolw. 170 (1868), *Miller, J.*; *Stevens v. Mack*, 5 Blatchf. 514 (1867), *Benedict, J.*

Construction of act of 1833, see *Dennistoun v. Draper*, 5 Blatchf. 336, *Nelson, J.*; *Abranches v. Schell*, 4 Blatchf. 256; *Wood v. Matthews*, 2 Blatchf. 370. The removal may be had without regard to the *amount* in controversy. *Wood v. Matthews*, 2 Blatchf. 370.

A suit against an officer of the United States is not removable under the act of 1833 on the ground that the act complained of was done under the *instructions of the treasury department*. *Vietor v. Cisco*, 5 Blatchf. 128—but see Rev. Stats., sec. 643. See *Benchley v. Gilbert* (Act of July 13, 1866, sec. 67), 8 Blatchf. 147; *Salt Co. v. Wilkinson*, 8 Blatchf. 30.

Cases arising under *direct tax* law are removable under act of 1833. *Peyton v. Bliss*, 1 Woolw. 170, *Miller, J.*

What are "*revenue laws*" under the act of March 2, 1833? That Act extends to an action in the State court against a postmaster for a wrongful refusal to deliver a letter to the plaintiff, and such an action was held to be removable into the Federal court. *Warner v. Fowler*, 4 Blatchf. 311 (1859), *Ingersoll, J.*

An *action of slander* begun in a State court against a *collector of customs*, for words spoken while in the discharge of his official duty and explanatory of it, may be transferred to the Federal court under the "*force act*" of March 2, 1833 (4 Stats. at Large, 633), which provides, "that any case where suit or prosecution shall be commenced in a court of any state against any officer of the United States, for or on account of any act done under the revenue laws of the United States, or under color thereof," may be removed by the defendant to the Federal court. The question arose on a motion to remand; and as it appeared from the petition for the removal that the words complained of were spoken by the defendant, while in the discharge of his official duties as collector, and in connection with a seizure of goods for an alleged violation of the revenue laws (which fact the motion to remand necessarily admitted to be true), the court held that words thus spoken were to be

the United States under specified circumstances ;⁵ and suits against certain *Federal Corporations*, or their members as such members, may be removed upon verified petition, "stating that such defendant has a defense arising under or by virtue of the Constitution or of any treaty or law of the United States."⁶

This act is not repealed by the act of March 3, 1875.⁷

It applies, in its true construction, only to corporations

considered, under the statute, as an act done under the revenue laws of the United States. Woods, Circuit Judge, says: "Words spoken in connection with the act of seizure, and in explanation or justification thereof, become part of the act, and together with the seizure form one transaction." *Buttner v. Miller*, 1 Woods C. C. 620 (1871).

Act of March 3, 1863 (12 Stats. at Large, 757), and act of March 2, 1867, as to removability of suits for acts done during the late rebellion under Federal authority. See *Milligan v. Hovey*, 3 Bissell, 13; s. c., 3 Ch. Legal News, 321; *Clark v. Dick* (limitation), 1 Dill. C. C. 8; *Woodson v. Fleet*, 2 Abb. U. S. 15; *Bigelow v. Forrest* (ejectment suit not removable), 9 Wall. 339 (1869); *Murray v. Patrie* (removal after judgment), 5 Blatchf. 343 (1866), reversed in *The Justices v. Murray*, 9 Wall. 274 (1869). This last case holds that so much of the 5th section of the Act of March 3 (1863), as provides for the removal of a judgment in a State court, where the cause was tried by a jury, for re-trial on the facts and law in the Circuit court, is in conflict with the seventh amendment of the Constitution, and void. *McKee v. Rains*, 10 Wall. 22; *Galpin v. Critchlow*, 112 Mass. 341 (1873); *Wetherbee v. Johnson*, 14 Mass. 412; *The Mayor v. Cooper*, 6 Wall. 247; *Lamar v. Dana*, 10 Blatchf. 34; *Bell v. Dix*, 49 N. Y. 232; *Anthon v. Morton*, 15 Am. Law Reg. (N. S.), 556; *Hodgson v. Milward*, 3 Grant (Pa.), 418. Criminal case can not be removed before indictment found in the State court. *Commonwealth v. Artman*, 3 Grant (Pa.), 436.

⁵ Rev. Stats., sec. 644.

⁶ Act of July 27, 1868. (15 Stats. at Large, 227; Rev. Stats., sec. 640.)

This statute, as found in sec. 640 of the Revised Statutes, is as follows: "Any suit commenced in any court other than a Circuit or District court of the United States against any corporation other than a banking corporation, organized under a law of the United States, or against any member thereof as such member, for any alleged liability of such corporation, or of such member as a member thereof, may be removed, for trial, in the Circuit court for the district where such suit is pending, upon the petition of such defendant, verified by oath, stating that such defendant has a defense arising under or by virtue of the Constitution or of any treaty or law of the United States. Such removal, in all other respects, shall be governed by the provisions of the preceding section."

⁷ *Kain v. Texas Pacific R. R. Co.*, 3 Cent. L. J. 12, Duval, J.

organized under a law of Congress, and does not include national banks, which are expressly excepted, nor corporations created by foreign governments or by the several states.⁸

Under this act Mr. Justice Nelson decided at the circuit two important points, which we notice, as they illustrate more or less questions which arise under other removal acts, and particularly the act of March 3, 1875. He held: 1st. Where one or more of the defendants have presented a petition for removal conforming to the act, and thus initiated the removal, it is not competent for the State court to take any proceedings in the cause, other than to perfect the removal, as the other defendants may appear and present their petitions, which they may do at different times. 2d. That the joining of defendants in a suit, not within the limitations of the act, with those who are, can not have the effect to defeat the Federal jurisdiction. He adds: "If this were permitted, the privilege extended to parties setting up a right under the Constitution and Laws of the United States, would, in most, if not in every instance, be defeated," and "most of these removal acts, depending principally upon the *subject-matter*, and intended to secure the interpretation of the Constitution and Laws of the United States, at the original hearing, to its own judiciary, would be futile and worthless." In such cases, "if these outside parties are deemed material, or are really material, to a complete remedy in behalf of the plaintiff, they must be regarded as subordinate and incidental to the principal litigation in respect to which the act of Congress has interposed the remedy of removal. In this way the right of the parties to have their defense, under the Constitution or Laws of the United States, tried in the Federal courts, is secured; and, at the same time, the remedy of the plaintiff is unimpaired."⁹

⁸ Jones v. Oceanic Steam Nav. Co., 11 Blatchf. 406 (1873).

⁹ Fisk v. Union Pacific R. R. Co., 8 Blatchf. 243, 248 (1871). The act of July 27, 1868 (Rev. Stats. 640), held to provide only for a case in which the federal corporation or member thereof was the *sole defendant*. Haz-

A petition for removal under this act must state that the corporation or member thereof applying for removal has "a defense arising under or by virtue of the Constitution of the United States or some treaty or law of the United States;" but it need not state what the defense is, nor the facts constituting it;—this is a matter for determination in the Federal court, not on motion to remand, but on formal pleadings, or pleadings and proof.¹⁰

The important acts of general operation as to removals, and which relate to cases that daily arise, are what is known as the 12th section of the Judiciary Act; the act of July 27,

and *v. Durant et al.*, 9 R. I. 602, 609 (1868), by Potter, J. But it was decided otherwise in *Fisk v. Union Pacific Railroad Co.*, 6 Blatchf. 362; s. c. 8 *ib.* 243, 299; and this latter is, undoubtedly, the true construction of the act on this point.

¹⁰ *Jones v. Oceanic Steam Nav. Co.*, 11 Blatchf. 406. See on this point *The Mayor v. Cooper*, 6 Wall. 247; *Dennistoun v. Draper*, 5 Blatchf. 336, *Nelson, J.*; *Turton v. Union Pacific R. R. Co.*, 3 Dillon, C. C. 366, *Miller, J.* Compare *Magee v. U. P. R. R. Co.*, 2 Sawyer, 447, *Hillyer, J.*; *Hazard v. Durant et al.*, 9 R. I. 602, before Potter, J.; *Kain v. Texas Pacific R. R. Co.* (East. Dist. Texas, Duval, J.), 3 Cent. L. J. 12 (1875); *Fisk v. U. P. R. R. Co.*, 8 Blatchf. 243; *ib.* 299. Under this act, *Hillyer, J.*, decided that the fact, that the corporation (the Union Pacific Railroad Co.) was one organized under a law of the United States, is not enough to authorize the transfer of a cause to the Circuit court of the United States. The action was one for a personal injury to the plaintiff; and it appearing that the only defense made by the answer was in denial of the imputed negligence, the decision of which depended entirely upon common-law principles, and not upon the construction of any act of Congress, the cause was, on motion, remanded to the State court. *Magee v. U. P. R. R. Co.*, 2 Sawyer, C. C. 447 (1873). Under the same state of facts, Mr. Justice Miller has held precisely the other way. *Turton v. U. P. R. R. Co.*, 3 Dillon, C. C. 366 (1875). The question is a close one; and the suggestion presents itself, if in every suit against a federal corporation, such a corporation necessarily has a defense under a law of the United States, because it is a corporation organized under a law of the United States, why did Congress not unconditionally provide for the transfer of all suits, without requiring a verified statement that they have "a defense arising under or by virtue of the Constitution or a treaty or a law of the United States?" As bearing on this subject, see *Osborn v. U. S. Bank*, 9 Wheat. 738; *Cohens v. Virginia*, 6 Wheat. 264; *Hazard v. Durant et al.*, 9 R. I. 602; *Kain v. Texas Pacific R. R. Co.*, 3 Cent. L. J. 12 (1875); *Fisk v. Union Pacific R. R. Co.*, 6 Blatchf. 362; s. c. 8 *ib.* 243, 299. The view

1866,¹¹ the act of March 2, 1867,¹² known as the "prejudice or local influence act," and lastly the act of March 3, 1875.¹³ This last named act was passed since the Revised Statutes, and consequently is not to be found therein. The 12th section of the Judiciary Act, the act of July 27, 1866, and of March 2, 1867, above mentioned, although technically repealed by the Revised Statutes of the United States, are substantially re-enacted in the 639th section thereof. These statutes are the foundation of the law on the subject of removals on the grounds therein provided for, and the principal purpose of this article is to give a *reading* on those statutes, or, in other words, an exposition of their meaning in the light of the adjudications which have been made under them.

The text of these statutes is so essential to an understanding of the subject, that we reproduce, for convenience, the more material portions of them in a note.¹⁴

of Mr. Justice Miller in the case of *Turton*, *supra*, derives strong support in the consideration that, under its charter, this corporation may sue and be sued originally in the Circuit court, without reference to citizenship or other ground of jurisdiction (*Bauman v. Union Pacific R. R. Co.*, 3 Dillon, 367), and jurisdiction by removal is but the exercise of original jurisdiction acquired in this manner. *Ante*, sec. 1.

¹¹ 14 Stats. at Large, 306.

¹² 14 Stats. at Large, 558.

¹³ Acts of 1875, p. 470.

¹⁴ Section 639 of the Revised Statutes is as follows: "Any suit commenced in any State court, wherein the amount in dispute, exclusive of costs, exceeds the sum or value of five hundred dollars, to be made to appear to the satisfaction of said court, may be removed for trial into the Circuit court for the district where such suit is pending, next to be held after the filing of the petition for such removal hereinafter mentioned, in the cases and in the manner stated in this section.

"*First.* When the suit is against an alien or is by a citizen of the state wherein it is brought, and against a citizen of another state, it may be removed on the petition of such defendant, filed in said state court at the time of entering his appearance in said State court." [This is, substantially, section 12 of the Judiciary Act.]

"*Second.* When the suit is against an alien and a citizen of the state wherein it is brought, or is by a citizen of such state against a citizen of the same, and a citizen of another state, it may be so removed, as against said alien or citizen of another state, upon the petition of such defend-

SECTION III.

VALIDITY OF THE REMOVAL ACTS—RIGHTS PROTECTED FROM
INVASION OR DENIAL BY THE STATES.

The power of Congress to authorize the transfer of cases, to which the Federal judicial power conferred by the Constitution extends, from the State courts to the Federal courts, has been frequently declared by the Supreme Court, and the constitutionality of the removal acts of 1789, 1833, 1863,

ant, filed at any time before the trial or final hearing of the cause, if, so far as it relates to him, it is brought for the purpose of restraining or enjoining him, or is a suit in which there can be a final determination of the controversy so far as concerns him, without the presence of the other defendants as parties in the cause. But such removal shall not take away or prejudice the right of the plaintiff to proceed at the same time with the suit in the State court, as against the other defendants." [This is, substantially, the act of July 27, 1866.]

"*Third.* When a suit is between a citizen of the state in which it is brought, and a citizen of another state, it may be so removed on the petition of the latter, whether he be plaintiff or defendant, filed at any time before the trial or final hearing of the suit, if before or at the time of filing said petition he makes and files in said State court an affidavit stating that he has reason to believe, and does believe that, from prejudice or local influence, he will not be able to obtain justice in such State court." [This is, substantially, the act of March 2, 1867.]

Section 639 of the Revised Statutes continues as follows: "In order to such removal, the petitioner in the cases aforesaid must, at the time of filing his petition therefor, offer in said State court good and sufficient surety for his entering in such Circuit court, on the first day of its session, copies of said process against him, and of all pleadings, depositions, testimony and other proceedings in the cause, or, in said cases where a citizen of the state in which the suit is brought is a defendant, copies of all process, pleadings, depositions, testimony, and other proceedings in the cause concerning or affecting the petitioner, and also for his there appearing and entering special bail in the cause, if special bail was originally requisite therein. It shall thereupon be the duty of the State court to accept the surety and to proceed no further in the cause against the petitioner, and any bail that may have been originally taken shall be discharged. When the said copies are entered as aforesaid in the Circuit court, the cause shall there proceed in the same manner as if it had been brought there by original process, and the copies of pleadings shall have the same force and effect, in every respect and for every purpose, as the original pleadings would have had by the laws and practice of the courts of such state if the cause had remained in the State court."

1866 and 1867, is established beyond question. "The validity of this legislation," says Mr. Justice Field, "is not open to serious question, and the provisions adopted have been recognized and followed, with scarcely an exception, by the Federal and State courts since the establishment of the government."¹⁵

Act of March 3, 1875. The second and third sections of this act in relation to the removal of actions are as follows: "§ 2. That any suit of a civil nature, at law or in equity, now pending or hereafter brought in any State court, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which the United States shall be plaintiff or petitioner, or in which there shall be a controversy between citizens of different states, or a controversy between citizens of the same state claiming lands under grants of different states, or a controversy between citizens of a state and foreign states, citizens or subjects, either party may remove said suit into the Circuit court of the United States for the proper district; and when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the plaintiffs or defendants, actually interested in such controversy, may remove said suit to the Circuit court of the United States for the proper district."

"§ 3. *Removal—Proceedings.*—That whenever either party, or any one or more of the plaintiffs or defendants entitled to remove any suits mentioned in the next preceding section, shall desire to remove such suit from a State court to the Circuit court of the United States, he or they may make or file a petition in such suit in such State court before or at the term at which said cause could be first tried and before the trial thereof, for the removal of such suit into the Circuit court to be held in the district where such suit is pending, and shall make and file therewith a bond, with good and sufficient surety, for his or their entering in such Circuit court, on the first day of its then next session, a copy of the record in such suit, and for paying all costs that may be awarded by the said Circuit court, if said court shall hold that such suit was wrongfully or improperly removed thereto, and also for there appearing and entering special bail in such suit, if special bail was originally requisite therein. It shall then be the duty of the State court to accept said petition and bond, and proceed no further in such suit, and any bail that may have been originally taken shall be discharged; and the said copy being entered as aforesaid in said Circuit court of the United States, the cause shall then proceed in the same manner as if it had been originally commenced in the said Circuit court," etc., etc.

¹⁵ *Gaines v. Fuentes et al.*, U. S. Sup. Court, Oct. Term, 1875, 3 Cent. L. J. 371; s. c. 2 Otto, 10. See also *Sewing Machine Companies' Case*, 18 Wall.

In this connection, it may also be observed that the right to remove cases into the Federal court, when the terms upon which the right is given by the acts of Congress in that behalf are complied with, can not be defeated by state legislation. Therefore, a State statute which allows an insurance company to do business in the state only on condition that it will agree not to remove suits against it to the Federal courts, is unconstitutional, and such an agreement, though entered into by the company, is void.¹⁶

SECTION IV.

MATERIAL ELEMENTS OF THE RIGHT, AS GIVEN BY THE PRINCIPAL STATUTES.

The material elements of the statutes on this subject, it will be perceived, are the *nature of the suits* which may be removed; the *amount or value* in dispute; the *parties* to the suit, and in this connection the *party entitled* to the removal; the *time* when the application must be made; the *mode* of making the application, and herein of the *surety or bond*, etc., required, and the *effect on the jurisdiction* of the State court and of the Federal court of a proper application to remove a cause which is removable.

553; *Johnson v. Monell*, 1 Woolw. 394; *Meadow Valley Co. v. Dodds*, 7 Nev. 143; *Chicago etc. Railway Co. v. Whitton's Admr.*, 13 Wall. 270; *The Mayor v. Cooper*, 6 Wall. 247.

¹⁶ *Insurance Co. v. Morse*, 20 Wall. 445. See also *Insurance Co. v. Dunn*, 19 Wall. 214; *Gordon v. Longest*, 16 Pet. 97; *Kanouse v. Martin*, 14 How. 23; s. c., 15 How. 198; *Stevens v. Phoenix Insurance Co.*, 41 N. Y. 149; *Holden v. Putnam Insurance Co.*, 46 N. Y. 1; *Hadley v. Dunlap*, 10 Ohio St. 1. *Home Insurance Co. v. Davis*, 29 Mich. 238, is inconsistent with *Insurance Co. v. Morse*, *supra*. In *Hartford Fire Ins. Co. v. Doyle* (West. Dist. Wis., *Hopkins, J.*), 3 Cent. L. J. 41, an act of the legislature of the state, making it the duty of the secretary of state to revoke licenses of companies for removing suits to Federal courts, was held void, and such revocation restrained by injunction.

SECTION V.

THE 12TH SECTION OF THE JUDICIARY ACT.

Before entering in detail upon the several elements of the removal enactments, it is advisable to advert to some general considerations touching these several statutes.

We commence with section 12 of the Judiciary Act. The reader may recur to its language as re-enacted in substance in the Revised Statutes, given in a note to a preceding section; and it is important to remember that from 1789 until the act of July 27, 1866, above mentioned, the 12th section of the Judiciary Act was the only statute authorizing the removal of causes from the State courts to the Circuit court of the United States, on the ground of *citizenship* of the parties.

Section 12 of the Judiciary Act, omitting the case of aliens, authorized the removal by the *defendant* (under limitations therein mentioned), where the suit is commenced in the State court “*by a citizen of the state in which the suit is brought, against a citizen of another state.*” That is, if the suit is by a resident plaintiff, the *non-resident* defendant may have it removed; but the resident plaintiff could not. Under section 11 of the Judiciary Act as to *original* suits in the Circuit court, a *non-resident* plaintiff might sue in the Circuit court a *resident defendant*; but if the non-resident plaintiff elected to sue in a State court, section 12 of that act gave *neither* party the right to remove the cause from the State court to a court of the United States. The plaintiff was not given the right, because he had voluntarily selected the State court in which to bring his action; the defendant was not given the right, because it was not supposed that *he* would have any grounds to object that he was sued in the courts of his own state. So that the right of removal by the 12th section of the Judiciary Act is limited to the non-resident citizen when sued by a resident plaintiff in the courts of the state. By section 11 of the Judiciary Act, the Circuit court

has jurisdiction when the suit is between a citizen of the state in which it is brought and a citizen of another state. This was construed by the courts to mean that, if there were several plaintiffs and several defendants, *each one of each class* must possess the requisite character as to citizenship.¹⁷ For example, a citizen of New York and a citizen of Georgia could not join as plaintiffs in suing in New York a citizen of Massachusetts, if found in New York, because the plaintiffs were not each competent to sue; for the citizen of Georgia could not, under section 11 of the Judiciary Act, sue a citizen of Massachusetts in New York.¹⁸ Some of the more important cases touching the jurisdiction of the Circuit court under the 11th section of the Judiciary Act, and concerning the effect of the act of 1839 (5 Stats. at Large, 321), which relates to suits commenced in the Circuit court, are referred to in the note, as they have a bearing on the construction of the 12th section.¹⁹

¹⁷ *Strawbridge v. Curtiss*, 3 Cranch, 267; *Coal Co. v. Blatchford*, 11 Wall. 172.

¹⁸ *Moffat v. Soley*, 2 Paine, C. C. 103. This restriction on the jurisdiction of the Federal courts is removed by the act of March 3, 1875, and now these courts would have jurisdiction of such a suit as that mentioned in the text.

¹⁹ The case of the *Commercial Bank v. Slocomb*, 14 Pet. 60 (except so far as it has been since overruled as to the suability of corporations in the Federal courts), holds, and only holds, that under the Judiciary Act the jurisdiction of the Circuit court is defeated if some of the defendants are citizens of the *same state with the plaintiff*; and that this principle was not changed by the act of February 28, 1839. Same principle affirmed, at the same term, in a case rightly decided. *Irvine v. Lowry*, 14 Pet. 293. See, also, *Clearwater v. Meredith*, 21 How. 489. In *Taylor v. Cook et al.*, 2 McLean, 516, the plaintiffs were citizens of *New York*, and brought suit in the Circuit court of the United States in *Illinois* against Cook, a citizen of *Illinois*, and Spaulding, a citizen of *Missouri*, who entered a voluntary appearance, and the question was, whether the court had jurisdiction, and, aided by the act of 1839, it was held that it had. Judge McLean, in delivering his opinion says, *arguendo*, that prior to the act of 1839, and under the 11th section of the Judiciary Act limiting the jurisdiction to suits between "a citizen of the state where the suit is brought and a citizen of another state," as construed, "the court could not take jurisdiction of the case; for as between the plaintiffs who are citizens of New York, and the defendant, Spaulding, who is a citizen of Missouri,

But it should be borne in mind that in cases removed from the State courts the *jurisdiction of the Circuit court is dependent upon the act under which the suit is removed*, and not upon the legislation which confers jurisdiction upon that court in cases originally brought therein; and therefore the restrictions on the jurisdiction in the 11th section of the Judiciary Act have no application to cases removed under the 12th section of that act.²⁰

Under section 12 of the Judiciary Act regulating removals, it is settled that a cause can not be removed thereunder unless *all* the defendants ask for it; that to bring the case within the act *all* the plaintiffs must be citizens of the state in which suit is brought, and *all* of the defendants must be *citizens* of some other *state* or *states*.²¹ But this rule, we may remark in passing, does not apply to persons who are mere nominal or formal parties.²²

the court could exercise no jurisdiction in the state of Illinois; because in that case neither party would reside in the state where suit is brought." But see *contra*, the observations, *arguendo*, of Wayne, J., in *Louisville Railroad Company v. Letson*, 2 Howard, on pp. 553, 554, in which he concludes that it is not necessary under the Judiciary Act that all of the defendants should be citizens of the same state, provided none of them are citizens of the same state with the plaintiff. (See *infra*, sec. 8.) The joinder of a defendant not served, and who does not appear, who is a citizen of the same state with the plaintiff, does not defeat the jurisdiction of the Circuit court; at all events, it does not since the act of 1839. *Doremas v. Bennett*, 4 McLean, 224. But the joinder of *such* a defendant who is served, if he be not a mere nominal defendant, does defeat the jurisdiction; at all events, it did prior to the act of March 3, 1875. *Ketchum v. Farmers' etc. Co.*, 4 McLean, 1; *Coal Co. v. Blatchford*, 11 Wall. 172; *Sewing Machine Co. Case*, 18 Wall. 553.

²⁰ *Green v. Custard*, 23 How. 484; *Barclay v. Levee Commissioners*, 1 Woods C. C. 254; *Bushnell v. Kennedy*, 9 Wall. 387; *Sands v. Smith*, 1 Dillon, 293, 297; *Sayles v. N. W. Ins. Co.* 2 Curtis, C. C. 212; *Gaines v. Fuentes*, U. S. Sup. Court, Oct. term, 1875, 2 Otto, 10, 3 Cent. L. J. 271; *Winans v. McKean, etc.*, Nav. Co. 6 Blatchf. 215.

²¹ *Beardsley v. Torrey*, 4 Wash. 286, (1822); *Ward v. Arredondo*, 1 Paine, 410 (1825); *Hubbard v. R. R. Co.*, 3 Blatchf. 84; s. c. 25 Vt. 715, (1853); *Beery v. Irick*, 22 Gratt. 484; *Ex parte Girard*, 3 Wall. Jr. 263; *Smith v. Rines*, 2 Sumn. 330; *Hazard v. Durant*, 9 R. I. 602; *In re Turner*, 3 Wall. Jr. 260; *Id.* 263.

²² *Browne v. Strobe*, 5 Cranch, 303; *Wormley v. Wormley*, 8 Wheat. 421; *Ward v. Arredondo*, *supra*; *Wood v. Davis*, 18 How. 467. *Who are*

Omitting the case of aliens, it will be perceived that the 12th section of the Judiciary Act (now Rev. Stat., Sec. 639, sub-division 1), gave the power of removal only under the following circumstances :

1. The plaintiffs, or if more than one, then all of the plaintiffs must be citizens of the state in which the suit is brought ;
2. The defendants, or if more than one, then *all* of the defendants must be citizens of another state or states ;
3. It is limited to *civil* suits, involving, besides costs, a sum or value exceeding \$500 ;
4. The right of removal is limited to the *defendant* or de-

nominal parties and who are not, see also *Bixby v. Couze*, 8 Blatchf. 73; *Coal Co. v. Blatchford*, 11 Wall. 172; *Davis v. Gray*, 16 Wall, 220; *Weed Sewing Machine Co. v. Wicks*, 3 Dillon, 261, 266; *Knapp v. Troy & Boston R. R. Co.*, Sup. Court, Oct. Term, 1873, 20 Wall. 117; where the cases are cited by Mr. Justice Davis. In this last case, the learned judge speaking of the removal act of 1867, says, "it does not change the settled rule that determines who are to be regarded as the plaintiff and the defendant; and as the plaintiff and defendant in this action were both citizens of New York, the Circuit Court had no jurisdiction to entertain it." 20 Wall. 124. The fact that defendants are named who have not been served, or have not appeared, and who are citizens of the same state with the plaintiff, will not defeat the right of removal. *Ex parte Girard*, 3 Wall. Jr. 263 (1858), Grier, J.

Nominal parties, or persons made parties who are not necessary to a determination of the real controversy, will not defeat the right to a removal. *Mayor etc. v. Cummins*, 47 Ga. 321 (1872); *Wood v. Davis*, 18 How. 467 (1855); *Ward v. Arredondo*, 1 Paine, 410 (1825), Mr. Justice Thompson.

Fraudulent or improper joinder of parties to prevent removal. See *Smith v. Rines*, 2 Sumner, 338; *Ex parte Girard*, 3 Wall. Jr. 263. *Improper joinder of causes of action*. *Cooke v. State Nat. Bank*, 52 N. Y. 96 (1873).

Officers of a corporation, joined with it as defendants to a bill in equity, but as to whom no relief was prayed in their individual capacity, and no relief which was not asked as against the corporation, are nominal parties in such a sense, as not to defeat the right of removal, if the right otherwise exists. *Hatch v. Ch., R. I. & P. R. R. Co.*, 6 Blatchf. 105 (1868).

As to effect, under the act of July 27, 1868, as to removal of cases by *Federal corporations*, or the joinder of defendants who do not possess the right of removal, see *ante*, sec. 2, and note.

defendants, and must be exercised or applied for by *all* of the defendants.²³

5. The petition for the removal must be filed *at the time* the defendant or defendants *enter their appearance* in the State court.²⁴ Hence, if some of the plaintiffs were not citizens of the state in which the suit was brought; or if some of the defendants were citizens of the same state with plain-

²³ *Smith v. Rines*, 2 Sumner, 338; *Beardsley v. Torrey*, 4 Wash. C. C. 286; *Ward v. Arredondo*, 1 Paine, 410; *In re Turner*, 3 Wall. Jr. 260, Grier, J.; *In re Girard*, *Id.*, 263; *Field v. Lowndale*, 1 Deady, 288; *Fisk v. Union Pacific R. R. Co.*, 6 Blatchf. 362; s. c., 8 Blatchf. 243, 299; *Dart v. Walker*, 4 Daly (N. Y.), 188; *Merwin v. Wexel*, 49 How. (Pr.) Rep. (N. Y.), 115. The above cases discuss the right to and effect of successive removals by different defendants under various removal acts.

In *Fallis v. McArthur*, 1 Bond, 100 (1856), it was held that, where *one oint defendant* removed the suit (the other not being served), the plaintiff was entitled to process in the Federal court against the defendant who was not served with process in the State court at the time the cause was removed. In *Field v. Lowndale*, *supra*, Deady, J., seems to be of a different opinion. See opinion of Mr. Justice Nelson in *Fisk v. Union Pacific R. R. Co.*, 8 Blatchf. 243 (1871); s. c., 8 *Id.*, 299; 6 *Id.* 362.

If a suit be brought by a citizen against several non-resident *joint debtors* in a state where the statute authorizes the plaintiff to proceed against the defendants served, and if he recover judgment, it may be enforced against the joint property of all, or the separate property of the defendants served, and the only defendants served are citizens of another state, such defendants are entitled to remove the cause, under the Judiciary Act, though the co-defendant not served does not join in the application. *Davis v. Cook*, 9 Nev. 134, (1874).

In an action for *joint indebtedness*, all the joint defendants, both under the act of July 27, 1866, and under that of March 2, 1867, must apply for the removal;—no one can remove under the act of 1866, unless a separate judgment can be rendered against him without the presence of the other defendants. *Merwin v. Wexel*, 49 How. (Pr.) Rep. 115.

²⁴ *Entering an appearance*; meaning of, construed and applied. *Chatham Nat. Bank v. Merchants' Nat. Bank*, 1 Hun, (N. Y.), 702, (Sup. Court, Special term 1874); *Dart v. Cook*, 9 Nev. 134 (1874); *Hazard v. Durant et al.*, 9 R. I. 602, 606; *Hough v. West. Transp. Co.*, 1 Biss. 425 (1864); *Sweeney v. Coffin*, 1 Dill. C. C. 73, Treat, J.; *McBratney v. Usher*, 1 Dill. C. C. 367; *Webster v. Crothers*, 1 Dill. C. C. 301. Other cases cited *infra*, sec 13.

Under sec. 12 of the Judiciary Act the petition need not be verified. *Sweeney v. Coffin*, 1 Dill. C. C. 73.

As to verification and mode of removal under other removal acts, *Id. Infra*. secs. 12, 13, 14.

tiff; or if the defendants answered or submitted to the jurisdiction of the State court before applying for the removal; or if all the defendants (other than formal or nominal parties) did not apply for the transfer; or if the amount in dispute did not exceed \$500—then, and in each of these cases, there could be no removal under the Judiciary Act.²⁵

SECTION VI.

ACT OF JULY 27, 1866.

The act of July 27, 1866 (now Rev. Stat., sec. 639, sub-division 2), is the first act which allowed *part* of the defendants to remove a cause; but this right is given by the act only under specified and limited circumstances. Omitting the case of aliens, which is of unfrequent occurrence and presents little that is peculiar, the following conditions must co-exist to authorize a removal under this act:

1. The suit in the State court must be by a plaintiff who is a citizen of the state in which the suit is brought.

2. It must be against a citizen of the same state *and* a citizen of *another* state as defendants.

3. The *amount* in dispute must exceed the sum or value of \$500, besides costs.

4. The removal must be applied for “before the trial or final hearing of the cause” in the State court.

These elements concurring, then the non-resident defendant (not the resident defendant), may have the cause removed, (not wholly), but only so far as relates to himself,

²⁵ See *Infra*, secs. 8, 9, 13, 15, and cases cited.

There can be no removal under the Judiciary Act (Rev. Stats., sec. 640, sub-division 1), if the plaintiff is an *alien*. *Galvin v. Boutwell*, 9 Blatchf. C. C. 470.

Federal jurisdiction dependent on *alienage*. *Hinckley v. Byrne*, 1 Dedy, 224; *Breedlove v. Nicolet*, 7 Pet. 413; *Wilson v. City Bank*, 3 Sumner, 422; *Montalet v. Murray*, 4 Cranch, 46; *Jackson v. Twentyman*, 2 Pet. 136; *Infra*, sec. 12, *note*. Resident unnaturalized foreigners are deemed aliens. *Baird v. Byrne*, 3 Wall. Jr.; *Lanz v. Randall*, 3 Cent. L. J. 688; s. c., 4 Dillon, C. C. *Indians* are not aliens. *Karraho v. Adams*, 1 Dill. C. C. 344.

provided also, it be a suit "brought for the purpose of restraining or enjoining him, or is a suit in which there can be a *final determination* of the controversy, *so far as concerns him*, without the presence of the other defendants as parties in the cause."²⁸

²⁸ Construction and extent of application of the act of 1866. *Hodgkins v. Hayes*, 9 Abb. N. Y. Pr. (N. S.), 87; *Darst v. Bates*, 51 Ill. 439; *Stewart v. Mordecai*, 40 Ga. 1.

In *Cape Girardeau and State Line R. R. Co. v. Winston et al.*, 4 Cent. L. J. 127 (1877), before Dillon and Treat, JJ., the last named Judge was strongly inclined to regard the act of 1866 as unconstitutional, and as repealed by implication by the act of March 3, 1875,—the Circuit Judge giving no opinion on these points, and both judges concurring in holding that, where in a suit brought in a State court by the plaintiff corporation *to set aside a deed of trust*, made by its officers and another corporation of the same state, a removal of the cause to the United States court was sought by the surviving trustee in the deed of trust and one of the bondholders under it, the latter corporation being a necessary party, and no final or effectual determination of the case made by the bill being possible without its presence, the petitioners could not have the cause removed under the act of 1866 (Rev. Stat., sec. 639, clause 2), as to them. See similar case, *Gardner v. Brown*, 21 Wall. 36, cited *infra*, sec. 9, note.

Construction of the act of 1866, as to cases in which there can be a *final determination of the controversy* as to the portion of the defendants removing the cause, without the presence of the other defendants. See *Bixby v. Couse*, 8 Blatchf. 73; *Peters v. Peters*, 41 Ga. 242; *Allen v. Ryerson*, 2 Dillon C. C. 501; *Case of Sewing Machine Cos.*, 18 Wall. 583; s. c. below, 110 Mass. 70; *Field v. Lamb*, 1 Deady, 430; *Field v. Lownsdale*, 1 Deady, 288 (1867). This last case holds that in a suit to quiet title against *tenants in common*, one of the defendants, as such tenant, may remove the case to the Federal court, under the act of 1866, if he is otherwise within its provisions.

In *McGinnity v. White*, 3 Dillon C. C. 350, it was held, under the circumstances, that one *copartner* might remove the cause as to himself under the act of 1866.

The act of 1866 has no application to a case where one of the defendants is *an alien*, and the other defendants are citizens of *another state*, and none of the defendants, or none who are served, are citizens of the state in which the suit is brought. *Davis v. Cook*, 9 Nev. 134 (1874).

Under a *joint application* by two defendants, the removal may, under the act of 1866, be granted to one and refused to the other. *Dart v. Walker*, 4 Daly (N. Y.), 188.

Under the act of 1866, *no affidavit* of local prejudice is necessary, such as is required by the act of 1867. *Allen v. Ryerson*, 2 Dillon C. C. 501.

As to *time and mode* of applying for removal under the act of 1866, see *infra*, secs. 13, 14.

The express provision is that the suit as between the plaintiff (a citizen of the state), and the other defendant (also a citizen of the same state with the plaintiff), shall proceed in the State court notwithstanding such removal to the Federal court. As between the plaintiff and the non-resident defendant (citizen of another state), the cause proceeds in the Federal court. It must be admitted that this is a singular result. The plaintiff's single action is thus split into two—one of which remains in the State court to be adjudged by it; the other goes to the Federal court to be adjudged by it. This act, it will be perceived, has no reference to cases in which *all* of the defendants are citizens of another state, (that being then provided for by section 12 of the Judiciary Act), nor any reference to the cases in which the plaintiffs are citizens of any other state than that in which the suit is brought. Its obvious purpose was to give a right of removal, in the cases and on the terms prescribed, to the non-resident citizen who was joined as a defendant with a resident citizen, when sued by a resident plaintiff.²⁷ It may be inferred that Congress doubted the power under the Constitution (art 3, sec. 2), to authorize the removal of the *whole* case, since part of the case provided for would be between citizens of the *same* state. We say this may be inferred, since otherwise we can scarcely conceive why it is that Congress would divide one case into two, and embarrass the parties with the inconvenience and additional expense resulting therefrom. Speaking of this act, Mr. Justice Clifford observes: "Considering the stringent conditions which are embodied therein, it is doubtful whether it will prove to be one of much practical value."²⁸ The necessity for this act grew out of the narrow construction early placed on the Judiciary Act, the embarrassments arising from which had been so long felt, and have finally led to the act of March 3, 1875. The ex-

²⁷ *Bixby v. Couse*, 8 Blatchf. 73; *Allen v. Ryerson*, 2 Dillon, 501; *Field v. Lowndale*, 1 Deady, 288 (1867); *Field v. Lamb*, *ib.* 430.

²⁸ *Case of Sewing Machine Companies*, 18 Wall. 553; s. c. below, 110 Mass. 70.

perience of the past should induce great caution in the courts in applying to that act the rigid principles of the early adjudications on the subject of Federal jurisdiction.²⁹

SECTION VII.

ACT OF MARCH 2, 1867—"PREJUDICE OR LOCAL INFLUENCE."

We now come to the act of March 2, 1867.³⁰ It purports to be an *amendment* to the act of July 27, 1866, last noticed, and it extends the right, in the cases therein provided for, as well to *plaintiffs* as to defendants, but confines it to such as are *non-residents* of the state in which the suit is brought, and makes the ground of removal, not alone the citizenship of the parties, but also prejudice or local influence. The act provides, "That where a suit is now pending or may hereafter be brought in any State court in which there is a controversy between *a citizen of the state in which the suit is brought* and a citizen of another state, * * * such citizen of another state, whether he be plaintiff or defendant, if he will make and file in such State court an affidavit that he has reason to believe and does believe that from prejudice or local influence he will not be able to obtain justice in such State court," may have the cause removed to the Circuit court of the United States. It will be seen that, as to the plaintiff, this act follows the language of section 11 of the Judiciary Act, and not of section 12 of that act; the plaintiff may or may not be a resident of the state where the suit is brought; and the right of removal is given to the non-resident party, be he the plaintiff or defendant. Construing this act, Mr. Justice Miller, in *Johnson v. Monell*,³¹ says:

"*The only conditions necessary to the exercise of the right of removal* under it are:

²⁹ See *infra* sec. 9 and note, and secs. 12 and 13.

³⁰ 14 Stats. at Large, 558; quoted *ante*, sec. 2, note.

³¹ 1 Woolw. 390.

"1. That the controversy shall be between a citizen of the state in which the suit is brought and a citizen of another state.

"2. That the matter in dispute shall exceed the sum of five hundred dollars, exclusive of costs.

"3. That the party citizen of such other state shall file the required affidavit, stating, etc., the local prejudice.

"4. Giving the requisite surety for appearing in the Federal court." * * * "Congress," adds this able judge, "intended to give the right in every case where the four requisites we have mentioned exist."

In the case just cited, the plaintiff was a citizen of Iowa, one defendant was a citizen of Nebraska, and the other of New York; but the last was not served with process and did not appear; and it was held that the plaintiff was entitled, under the act of March 2, 1867, to have the case transferred from the State court to the United States court, after a verdict of the jury in the State court in his favor had been set aside by the court. This act, let it be noted, only applies where one of the parties is a citizen of the state in which the suit is brought, and the adverse party is a citizen of another state—in this respect conforming to the previous legislation on the subject.³² This act undoubtedly grew out

³² *Construction and extent of application of the act of 1867.—Policy and purpose of the acts of 1866 and 1867, stated by Graves, C. J., in Crane v. Reeder, 28 Mich. 527 (1874); by Potter, J., in Hazard v. Durrant et al., 9 R. I. 602 (1868); by Blatchford, J., in Fisk v. Union Pacific R. R. Co., 6 Blatchf. 362; by Gray, C. J., in Galpin v. Critchlow, 112 Mass. 339 (1873).*

The act of 1867 (Rev. Stats. sec. 639, cl. 3) does not apply, where the cause of removal is *alienage*, but is *limited to citizens*. Crane v. Reeder, 28 Mich. 527, (1874); Davis v. Cook, 9 Nev. 134, (1874).

Under act of 1867 the *whole suit* is to be removed. Sewing Machine Cos.' Case, 18 Wall. 553; s. c. below, 110 Mass. 81; Cooke v. State Nat. Bank, 52 N. Y. 96, (1873); s. c. below, 1 Lansing, 494. And *all the defendants*, not nominal or merely formal parties, must apply for the removal. Bixby v. Couze (Blatchford, J.), 8 Blatchf. 73, (1870); Cooke v. State Nat. Bank, 1 Lansing (N. Y.), 494; s. c., 52 N. Y. 96, (1873). As to who are nominal or formal parties, see *ante*.

Parties—Citizenship under act of 1867. In the leading case on this stat-

of the condition of affairs in the Southern states after the War of the Rebellion, and was intended to afford to plaintiffs who had resorted to the State court the right

ute, entitled in the report the *Sewing Machine Companies' Case*, it was decided that an action *ex contractu*, by a plaintiff who was a citizen of the state in which the suit was brought, against two defendants, citizens of other states, and a third defendant, a citizen of the *same state as the plaintiff*, was not removable under the act of 1867, upon the petition of the two non-resident defendants, (18 Wall. 553); and the same principle was re-asserted in a subsequent case, where the removal of the *whole suit*, under the act of 1867, was sought, and not of the suit as to the non-resident defendants under the act of 1866. *Vannevar v. Bryant*, 21 Wall. 41; *Case v. Douglas*, 1 Dillon, 299; *Johnson v. Monell* (change of residence), 1 Woolw. 390; *Bixby v. Couse*, 8 Blatchf. 73 (1870); *Florence etc. Co. v. Grover & Baker etc. Co.*, 110 Mass. 70, affirmed 18 Wall. 553.

In the case of *Burnham v. Chicago, Dubuque & Minnesota Railroad, Co. et al.*, the Circuit court of the United States, for the district of Iowa, May term, 1876 (Miller and Dillon, JJ.), decided the following: A foreclosure suit by trustees in a railway mortgage, who are citizens of *Massachusetts*, was commenced in one of the State courts in Iowa, against the debtor company (which is an *Iowa* corporation), making an *Illinois* and an *Indiana* corporation, each of which claimed liens upon the property, also defendants to the bill; this suit, after all of the defendants had answered, was removed, in 1876, to the Circuit court of the United States for the district of Iowa, upon the petition of the *plaintiffs* under the act of 1867. Rev. Stat., sec. 639, sub-division 3. The debtor corporation moved to remand the same to the State court, because *all* of the defendants were not citizens of *the state in which the suit was brought*. Held, inasmuch as the case was one clearly within sec. 2, of the act of March 3, 1875, in respect of removals, and the controversy, one in relation to the priority of liens between citizens of different states, that the Circuit court had jurisdiction, and that it should not be remanded. See *Beery v. Irick*, 22 Gratt. 484.

Under the act of 1867, where *non-resident and resident plaintiffs* are joined, the non-resident plaintiffs can not remove the case wholly or as to themselves. All the plaintiffs must be citizens of the state in which the suit is brought. *Bliss v. Kawson*, 43 Ga. 181 (1871). See *Stewart v. Mordecai*, 40 Ga. 1; *Bryant v. Scott*, 67 N. C. 391 (1872); *Case v. Douglas*, 1 Dillon C. C. 299.

In *Sands v. Smith*, 1 Abb. U. S. 368, s. c., 1 Dillon, 290, it was held that, under the act of 1867, a non-resident plaintiff might remove a suit against a citizen of the state in which it was brought *and* a citizen of a third state who had voluntarily appeared, as to all the defendants. This seems to be right in view of the act of 1839; but some doubt is thrown upon the case by the reference to it in the *Sewing Machine Cos.' case*, 18 Wall. 553.

to transfer their suits to the Federal courts.³³ This is the first act that in any event extended the right to a *plaintiff* to leave the forum he had voluntarily chosen, and in this respect was an entire departure from all the previous legislation. It is not so difficult to justify the act in this respect, even if it was intended to be permanent, as it is to sustain the provision that this removal may be had, on filing the general affidavit of prejudice or local influence, the truth of which can not be contested or inquired into, "at *any time* before trial or final hearing of the suit." This provision occasions delay, and is often resorted to for that purpose. But the act of 1867 has been expressly adjudged by the Supreme Court to be constitutional,³⁴ and Congress has not, in our judgment, repealed or modified it. There is no express repeal, and it is not, according to the better view, repealed by implication by the act of March 3, 1875, next to be noticed.³⁵

In passing for the present from this act, we direct attention to Mr. Justice Miller's vindication of it. He says: "I do not join in the condemnation of the act of 1867. It does not allow the removal solely on the ground of citizenship. It requires the requisite citizenship to exist, and in addition thereto requires the existence of prejudice or local influence to be shown by affidavit. In this respect the policy of that act is not unlike that which prevails in perhaps all the states in regard to the change of venue from one county, or one

Case v. Douglas (citizenship of plaintiffs who are copartners), 1 Dill. C. C. 299; Cooke v. State Nat. Bank (all the defendants must unite), 1 Lansing, N. Y. 494; s. c., 52, N. Y. 96 (1873); Washington etc. R. R. Co. v. Alexandria etc. R. R. Co., (act of 1867 does not repeal act of 1866), 19 Gratt. (Va.), 562 (1870); Fields v. Lamb (as to repeal, etc.) 1 Deady, 430; Beecher v. Gillett (removal by substituted defendant), 1 Dillon C. C. 308; Johnson v. Monell (time of removal—change of residence), 1 Woolw. 390.

Decisions concerning the *affidavit* required by this act, see *infra*, sec. 14.

³³ Gaines v. Fuentes, U. S. Sup. Court, Oct. term, 1875, 3 Cent. L. J. 371; s. c., 2 Otto, 10.

³⁴ Chicago & N. W. Railway Co. v. Whitton's Admr. 13 Wall. 270.

³⁵ *Infra*, sec. 8.

judicial district, to another. *Johnson v. Monell*, 1 Woodw. 390. The object in each case is to secure an impartial tribunal, and the Federal courts are not courts for non-residents more than for residents, and no injustice is done to the latter to be compelled there to litigate controversies which they may have with citizens of other states.”³⁶

SECTION VIII.

ACT OF MARCH 3, 1875.

We now reach the act of March 3, 1875 (19 Stats. at Large, 470), entitled “an act to determine the jurisdiction of the Circuit courts of the United States, and to regulate the removal of causes from State courts, and for other purposes.”

The first section of the act relates to the *original jurisdiction* of the Circuit court, civil and criminal, greatly enlarging the jurisdiction in civil cases, and conferring a jurisdiction concurrent with the courts of the several states, using for this purpose the language of the article of the Constitution (art. 3, sec. 2), which defines and limits the judicial power of the general government. The civil jurisdiction, as there conferred, is given in certain specified cases by reason of the *subject-matter*, irrespective of the citizenship of the parties, and in other cases by reason of *citizenship*, irrespective of the subject-matter. It is material to notice the clause giving jurisdiction on the ground of citizenship. It removes the limitation prescribed by the Judiciary Act and by the prior removal acts, requiring one of the parties to the suit, that is, either the plaintiffs or the defendants, to be citizens of the state where the suit is brought. On the contrary, the act of March 3, 1875, confers jurisdiction of all suits of a civil nature, over \$500, in which there shall be a controversy between citizens of different states, without

³⁶ *Farmers' etc. Trust Co. v. Maquillan*, 3 Dillon, 379, 381.

requiring any of the parties to be citizens of the state in which the suit is brought. The second section of the act relates to removals [note to sec 2, *ante*]; and as to the suits which may be removed, it follows the language of the first section. So that it is true, in general, that any cause may, at the proper time and in the prescribed mode, be removed from the State court to the Circuit court of the United States, which, by reason of either its subject-matter or the citizenship of the parties, might have been instituted originally in the Federal court.

The act of 1875 on the one hand adds to or enlarges the classes of cases that may be removed, and on the other hand restricts the time in which the removal must be applied for within narrower limits than the acts of 1866 and 1867. The required amount or value is the same as before, *i. e.*, it must exceed \$500, exclusive of costs. In all previous legislation, the right of removal, where citizenship is the ground, is limited to the non-resident citizen, whereas in the act of 1875 it is given to "*either party*," and in certain circumstances to *either one* or more of the plaintiffs or defendants. This is a radical change of policy.

An analysis of the second section of the act shows that in respect of *subject-matter*, without reference to citizenship, it gives the right of removal of "any suit of a civil nature at law or in equity," involving over \$500, (1) arising under the Constitution, or laws or treaties of the United States; or (2) in which the United States shall be plaintiff or petitioner. And in respect of *citizenship*, without regard to subject-matter, it gives the right of removal (1) in any suit "*in which there shall be a controversy between citizens of different states*;" or (2) a controversy between citizens of the same state claiming lands under grants of different states; or (3) a controversy between citizens of a state and foreign states, citizens, or subjects."

In respect of the *time* in which the removal must be applied for, the provision is that the petition therefor must be filed in the State court "before or at the term at which the

cause *could be first tried*, and before the trial thereof." The decisions under the acts of 1866 and 1867 as to removals after one trial had and a new trial granted, which will be alluded to hereafter, may not be and probably are not applicable under the act of 1875.³⁷

Many questions of great importance arise under this act, among which we may mention in this place the question how far it repeals, if at all, the 12th section of the Judiciary Act, the act of 1866 and the act of 1867, or rather these several acts as substantially embodied in the 639th section of the Revised Statutes. There is no express repeal in the act of 1875 (see section 10), of any specified previous acts, the repeal being only of "all acts and parts of acts in conflict with the provisions of this act." It would seem that sub-division one of sec. 639, Revised Statutes, (12th section of the Judiciary Act), is practically repealed by reason of being merged in the more enlarged right given by the act of 1875. If, however, a case should arise which could be removed under this provision, but which could not be removed under the act of 1875, the former would be held to be still subsisting. If a liberal construction shall be, and can constitutionally be, given to the latter portion of section 2 of the act of 1875, the above remark as to repeal may possibly apply, except as to time, to sub-division *second* of section 639 of the Revised Statutes, corresponding to the act of 1866. But the better view, probably, is that the act of 1866 is not repealed by the act of 1875; that is to say, if a case is brought within its provisions, it may still be removed thereunder, and cases may arise of such a nature, that they would fall within the act of 1866, and not within that of 1875; in which event the latter act should not be held to repeal by implication the former. The *third* sub-division of that section (corresponding to the act of 1867) is broader than the act of 1875, provides for a class of cases not provided for by that act, and while the point is not free of

³⁷ See *infra*, sec. 13, as to *time* of applying for the removal under the act of 1875; *infra*, sec. 14, as to *mode* of effecting the removal.

doubt, the true view seems to be that at all events this portion of the 639th section remains unrepealed. This has been decided to be so in the 8th circuit by Mr. Justice Miller, and generally in the courts of that circuit, and so far as we are advised, by the Circuit courts elsewhere.

Concerning the nature of the suits that may be removed under the act of 1875, perhaps the true view is, that it contemplates the removal of the *whole suit*, and not, like the act of 1866, of part of a suit. This has been thus held in the 7th circuit.³⁸ If, therefore, the main and essential controversy is between citizens of the same state, a non-resident defendant interested in a collateral branch of the case can not remove it under the act of March 3, 1875.³⁹

One of the most important questions which arises under the act of 1875 is, whether the Federal judicial power as conferred and limited by the Constitution can, by reason of *citizenship*, extend to a case in which some of the necessary defendants are citizens of the *same state* with the plaintiffs or some of the plaintiffs. Expressions may, perhaps, be found in opinions of the Supreme Court construing the 11th and 12th sections of the Judiciary Act and the removal acts of 1866 and 1867, which deny, or would seem to deny, that under the Constitution the Federal judicial power extends on the ground of citizenship to cases where any of the defendants in interest are citizens of the same state with the plaintiffs, although some of the defendants may be citizens

³⁸ *Chicago v. Gage* (Blodgett, J.), 8 Chicago Legal News, 49 (1875); s. c., 6 Bissell, 467; *Osgood v. Chicago etc. R. R. Co.* (Drummond, J.), 7 Ch. Legal News, 241; s. c., 6 Bissell, 330. In *Ellerman v. New Orleans etc. R. R. Co.*, 2 Woods, C. C. 120 (1875), Mr. Circuit Judge Woods held that, under the act of 1875, there may be a removal of that part of a cause which concerns the original parties, notwithstanding a statute of the state may declare that the trial as to certain other parties can not be separated from the trial of the main cause,—leaving the latter issue in the State court. But the point did not require much consideration, for the reason that the latter parties had disclaimed and had no such interest in the suit or relative to it, as to defeat the right of removal.

³⁹ *Chicago v. Gage* (Blodgett, J.), 8 Chicago Legal News, 49, (1875); s. c., 6 Bissell, 467.

of other states than the one of which the plaintiff is a citizen. But all the legislation previous to the act of 1875 was such, that the Supreme Court was not necessarily obliged to decide this question; and it is in our judgment properly to be considered as still open. It will be extremely embarrassing and unfortunate, if the Supreme Court shall feel constrained to assign such narrow limits to the Constitution. Looking at the purpose in the grant of the Federal judicial power in the Constitution, and the benefits which are felt to flow from the exercise of this jurisdiction, and the embarrassments which would result from a close and rigid construction of the Constitution in this regard, we think the Supreme Court would be justified in holding that a case does not cease to be one between citizens of different states, because one or some of the defendants are citizens of the same state with the plaintiffs or some of the plaintiffs, provided the other defendants are citizens of another or other states. If the substantial controversy is wholly between citizens of the same state, it is not, and can not become, one of Federal cognizance; but if the real litigation is between citizens of different states, the case is within the constitutional grant of Federal judicial power, notwithstanding some of the adversary parties may happen to be citizens of the same state with some of the plaintiffs.

The case of *Lockhart v. Horn*, 1 Woods, C. C. R. 628, 634 (1871), arising under a former act, contains an expression of the opinion of Mr. Justice Bradley concerning the constitutional question above mentioned. In conformity with the accepted construction prior to that act he held, that the Circuit court has no jurisdiction of a cause in which the plaintiff and part only of the defendants were citizens of the *same* state, although they answer without objecting to the jurisdiction. He says: "Were this an original question, I should say that the fact of a common state citizenship existing between the complainants and a part only of the defendants, provided the other defendants were citizens of the proper state, would not oust the court of jurisdiction."

*It certainly would not under the Constitution. The case would still be a controversy between citizens of different states.*⁴⁰ [The act of 1875 uses the language of the Constitution, it will be remembered.] “But the strict construction put by the courts upon the Judiciary Act,” he continues, “is conclusive against the jurisdiction; and I am

⁴⁰ See, on this subject, case of Sewing Machine Cos., 18 Wall. 553, affirming s. c., 110 Mass. 70, 80; New Orleans v. Winter, 1 Wheat, 91 (1816); Woods v. Davis, 18 How. 467; Hepburn v. Ellzey, 2 Cranch, 445; Strawbridge v. Curtiss, 3 Cranch, 267.

In the case of Bryant v. Rich, 106 Mass. 192, (s. c. in U. S. Sup. Court, under name of Vannevar v. Bryant, 21 Wall. 41), Chief Justice Gray says *arguendo*: “Five of the nine defendants in this case, as well as the plaintiff, are citizens of this commonwealth; and the courts of the United States are not authorized by the Constitution to take jurisdiction, so far as it depends upon the citizenship of the parties, of suits between citizens of the same state, but only of suits between citizens of different states, or between a citizen and an alien, and can therefore have no jurisdiction (except when it grows out of the subject-matter) of an action in which any of the plaintiffs and of the defendants, who are real parties in interest, by or against whom relief is sought, are citizens of the same state. Const. of U. S., art. 3, § 2; Strawbridge v. Curtiss, 3 Cranch, 267; New Orleans v. Winter, 1 Wheat. 91; Wood v. Davis, 18 How. 467; Tuckerman v. Bigelow, 21 Law Reporter, 208; Wilson v. Blodgett, 4 McLean, 363.”

An examination of the cases here cited will show that they turn upon the language of the Judiciary Act, and not on the Constitution. So, in the very recent case of Ober v. Gallagher, (U. S. Sup. Court, Oct. Term, 1876), Chief Justice Waite says, *arguendo*, that if “an indispensable party was a citizen of the same state with the plaintiff, the jurisdiction would be defeated, because the controversy would not be between citizens of different states, and thus not within the judicial power of the United States, as defined by the Constitution. The decisions to this effect are numerous: Hagan v. Walker, 14 How. 36; Shields v. Barrow, 17 How. 141; Clearwater v. Meredith, 21 How. 492; Insbuch v. Farwell, 1 Blatchf. 571; Barnes v. Baltimore City, 6 Wall. 286; Jones v. Andrews, 10 Wall. 332; Commercial and R. R. Bank of Vicksburg v. Slocomb, 14 Pet. 65. In Louisville R. R. Co. v. Letson, 2 How. 497, it is also distinctly stated (p. 556), that the act of 1839 was passed exclusively with an intent to rid the courts of the decision in the case of Strawbridge v. Curtiss, 3 Cranch, 267, which, with that of the Bank v. Deveaux, 5 Cranch, 84, had ‘never been satisfactory to the bar.’” But the cases here cited did not necessarily involve an inquiry or decision as to the extent of the constitutional point of judicial power as respects controversies between citizens of different states.

bound by it. Nevertheless, the case is such that the complainant may dismiss his bill as to the obnoxious defendants and hold it as to the others. I will permit him to do so. This should be allowed in all cases where the objection is not made *in limine*."

The judicial power of the United States, as conferred by the Constitution, extends "*to all cases arising under the Constitution and Laws of the United States*," whether they are pending in the State or Federal tribunals. The act of March 3, 1875, both in prescribing the original jurisdiction of the Circuit courts of the United States, and in describing the class of cases which may be removed into the Circuit courts from the State courts, follows the language of the Constitution. It is therefore important to know, *what is a case arising under the Constitution or Laws of the United States*. The question has been frequently before the Supreme Court of the United States, and some of the leading judgments are cited in the note.⁴¹ "A case in law or equity consists of the right of the one party, as well as the other, and may be truly said to arise under the Constitution or a law of the United States, whenever its correct decision depends upon a right construction of either."⁴² "Nor is it," says Mr. Justice Swayne, "any objection, that questions are involved which are not all of a Federal character. If one of the latter exist, if there be a single such ingredient in the mass, it is sufficient. That element is decisive upon

⁴¹ *Martin v. Hunter's Lessees*, 1 Wheat. 314; *Cohens v. Virginia*, 6 Wheat. 264; *Osborn v. Bank of U. S.*, 9 Wheat. 821; *United States v. Peters*, 5 Cranch, 115; *Ableman v. Booth*, 21 How. 506; *Meserole v. Union Paper Collar Co.*, 6 Blatchf. 356; *Freeman v. Howe*, 24 How. 450; *Murdock v. Memphis* (full discussion), 20 Wall. 591; *The Mayor v. Cooper*, 6 Wall. 247; *Murray v. Patrie*, 5 Blatchf. 343; *Claffin v. Houseman* (U. S. Sup. Court, Oct. Term, 1876), 9 Ch. Legal News, 105; s. c., 3 Cent. L. J. 803; *N. Y. Life Ins. Co. v. Hendren* (U. S. Sup. Court, Oct. Term, 1875), 8 Ch. Legal News, 385; *Ames v. Colorado Central R. R. Co.*, 9 Ch. Legal News, 132; s. c., 3 Cent. L. J. 815. See *ante*, sec. 2 and note, and cases cited under the acts of 1833 and July 27, 1868 (Rev. Stats., sec. 640).

⁴² Per Marshall, C. J., in *Cohens v. Virginia*, 6 Wheat. 379.

the subject of jurisdiction,"⁴³ whether it exists in favor of the plaintiff or the defendant.

But there must be some question actually involved in the case, depending for its determination upon the correct construction of the Constitution, or some law of Congress, or some treaty of the United States, in order to sustain the Federal jurisdiction under the clause under consideration, namely, "suits arising under the Constitution, or laws or treaties of the United States." Accordingly, a case relating to the title to land is not one of Federal jurisdiction, although the title may be originally derived under an act of Congress, if no question arises, or is raised, as to the validity or operative effect of the act of Congress, and the rights of the parties depend upon State statutes or the general principles of law.⁴⁴

⁴³ *The Mayor v. Cooper*, 6 Wall. 252; *Connor v. Scott* (West. Dist. Ark., Parker, J.) 3 Cent. L. J. 305.

When a case involves the construction of the *bankrupt act*, it may be removed to the Federal court, under the act of March 3, 1875. *Connor v. Scott* (West. Dist. Ark., Parker, J.), 3 Cent. L. J. 305 (1876); *Payson v. Dietz* (removal by assignee in bankruptcy, on ground of citizenship), 5 Ch. Legal News, 434; *Trafton v. Nougues* (as to removal of suits in relation to mining claims), 13 Pacific Law Rep. 49; s. c., 4 Cent. L. J. 228, cited *infra*.

⁴⁴ *McStay v. Friedman*, 92 U. S. R. (2 Otto), 723; *Romie v. Casanova*, 91 U. S. R. (1 Otto), 380; *Trafton v. Nougues* (Dist. Cal., Sawyer, Circuit Judge), 13 Pacific Law Rep. 49 (1877); s. c. 4 Cent. L. J. 228. The learned Circuit Judge, in the case last cited, upon a review of certain decisions of the Supreme Court of the United States, arrives at the following conclusions: 1. Only suits involving rights depending upon a disputed construction of the Constitution and Laws of the United States can be transferred from the State to the National courts, under the clause "arising under the Constitution and Laws of the United States," of section 2 of the Act to determine the jurisdiction of the United States courts, passed March 3d, 1875. 2. Where the only questions to be litigated in suits to determine the right to mining claims are, as to what are the local laws, rules, regulations and customs by which the rights of the parties are governed, and whether the parties have in fact conformed to such local laws and customs, the courts of the United States have no jurisdiction of the cases under the provisions of the Act giving jurisdiction in suits "arising under the Constitution and Laws of the United States."

SECTION IX.

NATURE OF SUITS THAT MAY BE REMOVED UNDER THE SEVERAL REMOVAL ACTS—PRACTICE AS TO REPLEADER.

We are prepared after this general survey of the subject to consider in detail other important topics belonging to it.

As to nature of suits that may be removed under the acts we have been reviewing. The language of section 639 of the Revised Statutes is “any suit * * * wherein the

Requisites of petitions to transfer causes from State to Federal court under the above clause of section 3 of the act of March 3, 1875, see *post*, sec. 14.

Two new and interesting points under the act of 1875 were ruled by Mr. Justice Davis and Judge Treat at the July Term, 1876, of the Circuit Court of the U. S., for the Southern District of Illinois. Mr. Robert E. Williams, of Bloomington, Illinois, of counsel in the causes, has thus stated the facts and substance of the decisions:

Turner Bros., citizens of New York, filed a bill against the Indianapolis, Bloomington & Western R. R. Co., the Farmers' Loan and Trust Co. *et al.*, in the State court, and a receiver was appointed. There were three mortgages on the road—in the first two, the Farmers' Loan and Trust Co. is trustee—in the other, an individual is trustee. Turner Bros. claimed to be bondholders of bonds under each of the mortgages, and also to be floating or unsecured creditors to a large amount. The receiver, it was claimed, was appointed by collusion between the parties. As soon as the Farmers' Loan and Trust Co. learned of the appointment of the receiver, it appeared in the State court, answered the bill, and filed a cross-bill to foreclose the two mortgages, and then filed a petition and bond to remove the case to the Federal court under the act of 1875. Turner Bros., the complainants in the bill, are citizens of New York, and the F. L. & T. Co. is a citizen of New York; but Turner Bros. were not, it was claimed, necessary parties to the litigation. A motion was made to remand to the State court for want of jurisdiction in the Federal court, as Turner Bros. and the F. L. & T. Co. were all citizens of New York. After full argument and consideration, Mr. Justice Davis announced the opinion both of himself and Judge Treat, in which he said that there was not a doubt that the case was properly transferred, and that the Federal court had jurisdiction. In substance he remarked. They, Turner Bros., sued in a double aspect, as bondholders and unsecured creditors. As bondholders their bill did not in any way charge on the trustee in either of the mortgages an inability or unwillingness to act, and all of the trustees were in fact parties and trying to enforce the trust; therefore, as bond creditors, they, Turner Bros., were not necessary

amount in dispute, * * exceeds the sum or value of five hundred dollars." The language of the act of 1875 (sec. 2) is "any suit of a civil nature at law or in equity." Although the language is different, the meaning is doubtless the same. It does not extend to *criminal* prosecutions, being

parties. As floating-debt creditors there was no controversy between the Turner Bros. and the trustee in the mortgages—as, of course, the mortgage took precedence of the floating debts; that as to the floating debts the only controversy was between the creditors and the debtor, the Railroad Co.; that, therefore, the principal controversy was between the trustees in the mortgages (the F. L. & T. Co.) and the corporation, and that the claim of Turner Bros. for their unsecured debt was improperly introduced into the case, and could not oust the Federal court of its rightful jurisdiction over the main controversy between the mortgagor and the mortgagees; but even if Turner Bros. as unsecured creditors had a right to be parties at all, their right was only to the surplus after payment of all mortgages, and their controversy was merely an incident to the main controversy about the mortgages, and that the intention of Congress, as plainly expressed in the act of March 3, 1875, was that, where the main controversy in a case was between citizens of different states, it was removable and carried with it all the incidents, and that a mere incident would not prevent the case from being removed.

The other case was this: A road in the southern part of the state had made a mortgage to the Farmers' Loan & Trust Co. A judgment creditor, by collusion with the Railroad Co., filed a bill and got a receiver appointed by the State court, making no defendant to the bill but the Railroad Co. It was claimed that this was done with the intent to obtain an undue advantage over the bondholders. As soon as the F. L. & T. Co. learned of it, it applied to the State court to be permitted to become a party defendant. It presented a sworn petition setting up its rights as trustee, and asking leave to be made a defendant, and with it filed an answer to the bill and a cross-bill to foreclose the mortgage. The State court refused to admit the F. L. & T. Co. as a defendant, saying it could not make such an order in vacation. The F. L. & T. Co. at once filed in the State court its papers—that is, its petition, answer and cross-bill, and a petition and bond to remove the case to the Federal court, and brought the record to the Federal court. There was no question about the citizenship of the parties; but the question was, as the F. L. & T. Co. was not made a defendant by the bill, and the State court had refused to make an order admitting it as a party, was it, the F. L. & T. Co., such a party within the meaning of the act of Congress as could file the petition and bond for removal? The F. L. & T. Co. contended that it was, as it was absolutely a necessary party to the litigation, and had done all it could to become a party; and if the State court could refuse to admit it as a party, it could nullify the act of Congress and leave the mortgagee without remedy.

limited to suits of a *civil* nature.⁴⁵ All cases which fall within the ordinary notion of an action at law on contract or for tort, or of a suit in equity, are undoubtedly embraced by the language. Speaking of the nature of suits which may be removed under the 12th section of the Judiciary Act (Revised Statutes, § 639, sub-division 1), Mr. Chief Justice Chase in *West v. Aurora*,⁴⁶ said: "A suit removable from a State court must be a suit regularly commenced by a citizen of the state in which the suit is brought, by process served upon the defendant who is a citizen of another state, and who, if he does not elect to remove, is bound to submit to the jurisdiction of the State court." This language is, perhaps, too broad to be strictly applicable to all cases, since suits have been held removable, and properly so we think, which were not "regularly commenced" in the State court on process issued from it.⁴⁷

Mr. Justice Davis decided that it was an absolutely necessary party, and that, as it had done all it could to become a party and had been wrongfully refused the right by the State court, it was a party for the purpose of removing the case, and that the case was rightfully removed.

⁴⁵ See *Rison v. Cribbs*, 1 Dillon, 181, 184; *Green v. United States*, 9 Wall. 655.

⁴⁶ 6 Wall. 139 (1867).

⁴⁷ *Patterson v. Boom Co.*, 3 Dillon, 465. In the case last cited it was held that a suit pending in a State court, between a land owner and an incorporated company seeking to appropriate his private property under the right of eminent domain, where the question to be tried is the value of such land, is *a suit of such a nature as may be removed* to the Federal court, although the proceeding in its inception was an appraisalment by commissioners appointed under the charter of the company.

What is an *original suit* which may be removed, and what is a mere supplement or sequence of a former suit and decree in the State court, is illustrated by the case of *Hatch v. Preston*, 1 Biss. 19 (1853), *Drummond, J.* See *West v. Aurora*, *supra*.

Plaintiff sued at law in the State court on a policy, and while it was pending, filed a bill in equity to reform it. Held, that the defendant might remove the equity suit—that being an *original suit* within the meaning of sec. 12 of the Judiciary Act, and not simply a suit ancillary to or in aid of the suit at law. *Charter Oak Fire Ins. Co. v. Star Ins. Co.*, (Nelson, J.), 6 Blatchf. 208 (1868).

A *garnishee* or *trustee*, holding property or credits of the principal defendant and joined as defendant for that purpose, was held by the Su-

The case of *West v. Aurora*, *supra*, is interesting as illustrating a class of questions which arise in respect of removals in consequence of the practice in the code states of mingling, or rather uniting legal and equitable relief in the *same* suit. In brief the case was this: The plaintiff sued the city of Aurora in the State court on coupons. The city made certain defenses, and by an additional answer prayed an injunction to restrain plaintiff from proceeding in any suit on the coupons, and from transferring them, and for a decree that the same be canceled and delivered up. Upon the filing of this additional answer the plaintiff discontinued his suit, and assuming that he was a defendant to the case made in the additional answer, and that this was a new suit against him, applied to remove the cause into the Federal court, under section 12 of the Judiciary Act. The Supreme Court held the case not removable and observed: "The filing of the additional paragraphs did not make a new suit within the meaning of the Judiciary Act. They were in the nature of defensive pleas, coupled with a prayer for injunction and general relief. This, if allowed by the code of Indiana (as it was), might give them, in some sense, the character of an original suit, but not such as could be removed from the jurisdiction of the State court," under the Judiciary Act which gives the right "only to a defendant who promptly avails himself of it at the time of appearance;" but here the plaintiffs had "submitted themselves, by voluntarily resorting to the State court, to its jurisdiction in its whole extent."⁴⁸ Some of the cases illustrative of the nature of suits that may be removed are cited in a note.⁴⁹

perior Court of Judicature of New Hampshire as not within the removal act of 1866, and hence could not have a transfer of the case as to himself, leaving the cause as between the principal parties in the State court. *Weeks v. Billings*, 55 N. H. 371 (1875).

⁴⁸ See *infra*, sec. 13.

⁴⁹ *Suits by attachment* may be removed. *Barney v. Globe Bank*, 5 Blatchf. 107; *Sayles v. N. W. Ins. Co.*, 2 Curtis C. C. 212. And *ejectment* actions. *Ex parte Turner*, 3 Wall. Jr. 258; *Torrey v. Beardsley*, 4 Wash. C. C. R. 242; *Allin v. Robinson*, 1 Dillon, 119; *Ex parte Girard*,

Where the case made by the pleadings in the State court is in its nature a *law action*, it must, when removed to the

3 Wall. Jr. 263 (1868), *Grier, J. And in replevin. Beecher v. Gillett*, 1 Dillon, 308; *Dennistoun v. Draper*, 5 Blatchf. 336. And a bill in equity to reform an insurance policy. *Charter Oak Co. v. Star Ins. Co.*, 6 Blatchf. 208. And a special statutory proceeding in the nature of a chancery remedy to confirm a tax title. *Parker v. Overman*, 18 How. 137; s. c. *Hempstead*, 692.

A proceeding to appropriate private property for public use, which at the time the removal was applied for had assumed the shape of an action at law regularly docketed in the State court, to be tried and determined as other cases, and judgment entered accordingly, is such a *suit* as may be removed. *Patterson v. Boom Co.*, 3 Dillon, 465.

Suit in a State court by strangers, the object of which is to annul a will and to recall the decree by which it was allowed to probate, is in effect a suit in equity, and may be removed to the Circuit court under the act of March 2, 1867, *Gaines v. Fuentes*, (Oct. Term, 1875, U. S. Sup. Court, 3 Cent. L. J. 371; s. c. 2 Otto, 10, overruling s. c., 25 La. An. 85), distinguished from *Broderick's Will* case, 21 Wall. 503, and proceedings to probate wills. *Fouvergne v. New Orleans*, 18 How. 470.

Under the legislation of Massachusetts in respect to the establishment of claims against the estates of deceased persons, which provides for the examination, by Commissioners of the Probate Court, of all claims of creditors against the estate, and for the allowance or rejection by the Commissioners of each claim, and which requires a statement of the amount allowed on each claim and a list of claims finally allowed, with a provision for an appeal by either party to a Superior court, which shall be tried as in an action at law prosecuted in the usual manner, except that no execution shall be awarded, it was held that such a claim, pending on appeal in the Superior court from the decision of commissioners appointed by the Probate court, could not be removed to the Circuit court of the United States under the act of 1867. *Du Vivier v. Hopkins*, 116 Mass. 125 (1874). This decision was rested upon two general grounds: 1. The claim against an estate is not such a *suit* as is contemplated by the removal acts of Congress; the Supreme Judicial Court of Massachusetts being of opinion that the jurisdiction of the State courts over the entire proceedings for the settlement of the estate is exclusive of the Federal courts; [but see *Craigie v. McArthur*, 9 Ch. Legal News, 156; s. c., 4 Cent. L. J. 237; s. c., 15 Al. Law J. 121; s. c., 4 Dillon C. C.; *Payne v. Hook*, 7 Wall. 425; s. c., 14 Wall. 252]; that nothing less than the whole cause can be removed, while here was an attempt, in the opinion of the Court, to remove part of the proceeding; that on the removal of a cause, where the right exists, the jurisdiction of the State court ceases and the Federal court must execute its own judgment, and can not after judgment remand the cause for any purpose, or transmit a certificate of its judgment to the State court, it not being an appellate tribunal, but a court of co-ordinate and independent jurisdiction; and

Federal court, proceed as such, and may do so (where the action is a purely legal one), although it is brought in the

here the Federal court could not issue execution on its judgment or certify the same to the State court. 2. The application could not be made in the appellate court, but under the act of Congress must be made in the court of original jurisdiction before final judgment; and here the decision of the Commissioners of the Probate Court would be final, unless modified by the State appellate court. The view of the Supreme Judicial Court of Massachusetts that a claim against the estate of a deceased person is not, under the statute of that state, such a *suit* as falls within the provision of the removal acts of Congress, is doubtless correct, at least while the proceeding is in the Probate court; but on the appeal of the creditor or executor the statute provided, that the supposed creditor shall file a written statement of his claim, in the nature of a declaration, "and like proceedings shall thereupon be had in the pleadings, trial and determination of the case as in an action at law prosecuted in the usual manner, except that no execution shall be awarded." This would seem to assimilate the case in the appellate court to an ordinary suit; but if so, the difficulty was that the application for the removal was not made before the final trial in the court of original jurisdiction as required by the act. Further as to the Federal jurisdiction in respect to suits concerning the settlement of estates of deceased persons, the probate of wills, etc., see *Mallett v. Dexter*, 1 Curtis C. C. R. 178. Compare with *Payne v. Hook*, 7 Wall. 425; *Williams v. Benedict*, 8 How. 107; *Vaughan v. Northup*, 15 Pet. 1; *Pratt v. Northam*, 5 Mason C. C. 95; *Gaines v. Fuentes*, 2 Otto, 10, overruling s. c., 25 La. Ann. 85; *Tarver v. Tarver*, 9 Pet. 174; *Gaines v. Chew*, 2 How. 619, 650; *Gaines v. New Orleans*, 6 Wall. 642; *Gaines v. Hennen*, 24 How. 553; *Fuentes v. Gaines*, 1 Woods C. C. 112, where Mr. Justice Bradley reviews previous cases of Mrs. Gaines in the Supreme Court; *Case of Broderick's Will*, 21 Wall. 503; *Burts v. Loyd*, 45 Ga. 104; *Hargroves v. Redd*, 43 Ga. 143; *Craigie v. McArthur*, 9 Ch. Legal News, 156; s. c., 4 Cent. L. J. 237; s. c., 15 Alb. L. J. 121.

A suit in a State court, *to restrain or stay execution of a judgment of the State court* by a seizure and sale of the complainant's lands, may be removed, under the act of 1875, although such an injunction has been allowed by the State court, if the requisites as to citizenship and amount exist, notwithstanding the Federal courts are prohibited by the Revised Statutes (sec. 720) from granting an injunction to stay proceedings in a State court; and the Federal court has power, under the act of March 3, 1875 (sec. 4), to continue, modify or dissolve the injunction allowed by the State court. *Watson v. Bondurant*, 2 Woods C. C. 166 (1875), Woods, Circuit Judge; s. c., 3 Cent. L. J. 398.

Right of removal, under act of 1875, of a *railway foreclosure suit* held not affected by the *pendency of another suit* in the State court by stockholders against the company, in which certain orders had been made as to a receiver; the right of removal was sustained. *Scott et al., Trustees*,

name of the real party in interest (as authorized by the State codes), instead of the person holding the bare legal title.⁵⁰

Where the suit in the State court is in its nature a *suit in equity*, it must proceed as an equity cause on its removal into the Federal court. The pleadings and practice in law actions, except where otherwise specially provided by act

v. Clinton & Springfield R. R. Co., (Drummond, J.), 8 Ch. Legal News 210; s. c., 6 Bissell, 529.

As to the removal of *torts* by one defendant under act of 1866, *quære* in *Vannevar v. Bryant*, 21 Wall. 41, 43; s. c. below, *Bryant v. Rich*, 106 Mass. 180. An action of *tort* against several defendants, for a *conspiracy*, can not be removed by part of them under the act of 1866, the Court being of opinion that there could not be a final determination of the *controversy* without the presence of all of the defendants. *Ex parte Andrews and Mott*, 40 Ala. 639 (1867)—Byrd, J., dissenting. The opinion discusses quite fully the construction of the acts of 1866 and 1867. The suit was brought in Alabama by citizens of the state against a citizen of that state and two citizens of another state; and it was held that the act of 1867 did not authorize its removal at the instance of the non-resident defendants. *Ib.*

Definition of "suit," "action," "case," "cases in law and equity," see Story Com. on Const., secs. 1645, 1647. *Weston v. City of Charleston*, 2 Pet. 449; *Holmes v. Jennison*, 14 Pet. 540; *Ex parte Milligan*, 4 Wall. 2; *Phillips' Pr.* (2d Ed.) 13, 55; *West v. Aurora*, 6 Wall. 139.

What is a suit or defense arising under a law of the United States, *Turton v. Union Pacific R. R. Co.*, 3 Dillon, 366; *Orner v. Saunders*, *Ib.* 284; *People v. Chicago & Alton R. R. Co.*, (construction of act of Congress of April 20, 1871), 6 Ch. Legal News, 316; *Osborn v. Bank of U. S.*, 9 Wheat. 738. Other cases cited *ante*, sec. 8.

Acts of 1866—Removal by part of defendants. The grantor in a deed of trust conveying the legal title in fee to a trustee to secure the payment of a debt to a third person can not under the act of 1866 remove a suit to foreclose such deed of trust in which he and the said trustee are defendants, leaving the trustee in the State court; and the reason is that the foreclosure by sale of land requires the presence of the party holding the legal title; and since, under the act of 1866, the cause was not removable as to the trustee, it could not be removed by the mortgagor. *Gardner v. Brown*, U. S. Sup. Court, Oct. Term, 1874, 21 Wall. 36; *Coal Co. v. Blatchford*, 11 Wall. 172; *supra*, sec. 6; *infra*, sec. 13.

⁵⁰ *Thompson v. Railroad Companies*, 6 Wall. 134; *Weed Sewing Machine Co. v. Wicks et al.*, 3 Dillon, 261; *Bushnell v. Kennedy*, 9 Wall. 391; Act June 1, 1872, 17 Stats. at Large, 197, sec. 5; Rev. Stats., sec. 914; *Wood. v. Davis*, 18 How. 467; *Knapp v. Railroad Co.*, 20 Wall. 117. Compare *Suydam v. Ewing*, 2 Blatchf, 359, as to which *quære*.

of Congress, are to be conformed, as nearly as may be, to the pleadings and practice in the State court of the particular state. But in equity it is otherwise. The pleadings and practice in equity causes in the Federal courts are uniform throughout the United States, and are governed by the Equity Rules prescribed by the Supreme Court of the United States and by the practice of the Court of Chancery in Great Britain as it existed before the recent changes in the judicial system of that country. The Federal courts have the same chancery jurisdiction in every state, and equity causes must be kept separate and distinct, from their inception to the end, from law actions, and are to be decided by principles of equity of uniform and general application.⁵¹

Where the suit in the State court *unites legal and equitable grounds of relief or of defense* as authorized by the codes, and it is removed, as it may be if the causes for removal exist, what is to be done with it in the Federal court, where law and equity suits and issues must be kept separate and distinct? In such a case *a repleader is necessary*, and the case must be cast in a legal mold, or in the equity mold, or be recast into two cases, one at law and one in equity, and the Federal court is undoubtedly competent to make all orders necessary to this end.⁵²

⁵¹ *Neves v. Scott*, 13 How. 268. See also *Green v. Custard*, 23 How. 484, where the reader will find, and perhaps be amused by, the Philippic of Mr. Justice Grier against the code system of pleadings and practice. His remarks are unjust to that system properly understood, but they are too often deserved by the loose practice which has grown up under it.

⁵² *Sands v. Smith*, 1 Dillon, 290, note; *Fisk v. Union Pacific R. R. Co.*, 8 Blatchf. 299; *Partridge v. Ins. Co. (set-off)*, 15 Wall. 573.

The text states the practice which has been pursued in the 8th Circuit; and the case of *Akerly v. Vilas*, 3 Bissell, 332, is not to be understood, we think, as authorizing legal and equitable grounds of relief or defense to be tried in one and the same suit after the removal to the Federal court, nor necessarily to confine the Federal court to the trial of the issues as made up on the pleadings in the State court. The practice in the Federal courts is quite general to allow amendments after the removal, in furtherance of justice and within the scope of the original cause of complaint. *Toucey v. Bowen*, 1 Bissell, 81 (1855), *Huntington*, J.; *Suydam v. Ewing* (practice after removal), 2 Blatchf. 359 (1852),

In *law cases*, pure and simple, *no repleader* in the Federal courts is necessary, especially since the Practice Act of June 1, 1872.⁵³ Nor is a repleader necessary *in equity causes* where the complaint or petition in the State court contains the substance of a bill in equity adapted to present the plaintiff's case. But although a repleader in such case be not indispensable, it may often be advisable. In cases, however, where legal and equitable matters are united or mingled, it is necessary, as above stated, to frame the pleadings anew after the cause reaches the Federal court,

Betts, J.; *Barclay v. Levee Commissioners*, 1 Woods C. C., 254; *Dart v. McKinney*, 9 Blatchf. 359 (1872).

⁵³ Rev. Stats. sec. 914; *Merchants' etc. Nat. Bank v. Wheeler* (South. Dist. N. Y.; Johnson, Circuit J.), 3 Cent. L. J. 13 (1875); *Dart v. McKinney*, 9 Blatchf. 359 (1872), Blatchford, J., under act of 1866. Formerly in cases removed under the Judiciary Act, and where the pleadings in the Federal court were different from those in the State courts, the practice in some of the courts was to require the plaintiff after the removal to file a *new declaration*, the same as if the suit had originally been commenced in the Federal court. *Martin v. Kanouse*, 1 Blatchf. C. C. 149; s. c., 15 How. 198.

Under the Revised Statutes, sec. 639, the party removing the cause is required to file in the Federal court "copies of the said process against him and of all pleadings, depositions, testimony or other proceedings in the cause," and "when the said copies are entered as aforesaid in the Circuit court, the cause shall there proceed in the same manner, as if it had been brought there by original process, and the *copies* of pleadings shall have the same force and effect, *in every respect and for every purpose*, as the original pleadings would have had by the laws and practice of the courts of such state, if the cause had remained in the State court." This clearly dispenses with the necessity of new pleadings in the Federal court, where the original pleadings are adapted to the separate law and equity jurisdiction of that court,—the obvious purpose of this legislation being that the Federal court shall take up the cause where it was when it left the State court, and proceed with it as if it had been originally brought in the Federal court. And, in substance, the same provisions are made in the act of March 3, 1875. See secs. 3, 4, 6, 7.

Costs in suits removed from the State court held to be governed, not by the Revised Statutes, sec. 968, but by the statute of the state; hence where, in an action of trespass on the case removed from the State court, the plaintiff recovered less than \$100, it was held that under the statute of Michigan (Comp. Laws, sec. 7290) the defendant was entitled to costs as a matter of right. *Scupps v. Campbell* (East. Dist. Mich., Brown, J), 3 Cent. L. J. 521 (1876).

so as to make it distinctively one at law or one in equity, or by a division into two, the one a law, the other an equity suit.⁵⁴

SECTION X.

FROM WHAT COURT THE REMOVAL MAY BE MADE—REMOVAL HOW ENFORCED—CERTIORARI.

The language of the Revised Statutes, sec. 639, and of the act of March 3, 1875, is: "Any suit in *any* State court," etc. In *Gaines v. Fuentes* the Supreme Court of the United States held that an action in form and purpose to annul a will and to recall the decree by which it was probated, brought in a State court without separate equity jurisdiction, and which is invested with jurisdiction over the estates of deceased persons, might be removed under the act of 1867 to the Federal court. Speaking of the case before the court and the act of 1867, Mr. Justice Field observed: "This act covered every possible case involving controversies between citizens of the state where the suit was brought and citizens of other states, if the matter in dispute, exclusive of costs, exceeded the sum of \$500. *It mattered not whether the suit was brought in a State court of limited or general jurisdiction.* The only test was, did it involve a controversy between citizens of the state and citizens of other states, and did the amount in dispute exceed a specified amount? And a controversy was involved in the sense of the statute whenever any property or claim of the parties, capable of pecuniary estimation, was the subject of litigation, and was presented by the pleadings for judicial determination."⁵⁵

⁵⁴ See *Dart v. McKinney*, 9 Blatchf. 359; *Akerly v. Vilas*, 2 Bissell, 110; *Green v. Custard*, 23 How. 484; *Fisk v. Union Pacific R. R. Co.*, 8 Blatchf. 299; *Partridge v. Ins. Co.*, 15 Wall. 573; *Sands v. Smith*, 1 Dillon, 290; *Thompson v. Railroad Cos.*, 6 Wall. 134; Rev. Stats., secs. 639, 914.

⁵⁵ *Gaines v. Fuentes et al.*, 3 Cent. L. J. 371; s. c., 8 Ch. Legal News, 225; s. c., 2 Otto, 10. In *The Rathbone Oil Co. v. Rauch*, 5 West Va.

Under the act of March 3, 1875 (sec. 7), the Circuit court of the United States, to which any cause shall be removable, under its provisions has power to issue a writ of *certiorari* to the State court, commanding that court to make return of the record in the cause; and the clerk of the State court is subjected to criminal punishment who refuses, after tender of fees, to the party applying for the removal a copy of the record.⁵⁶

79 (1871), referred to *infra*, it was held that no motion to remove a cause can be made before a justice of the peace, that not being a "State court" within the meaning of the act of Congress,—but the act of Congress is, "any State court," whether of general or limited jurisdiction.

⁵⁶ *Certiorari*—*Copies of record*—*Mandamus to enforce removal, etc.*—The only object of a *certiorari* is to bring the record from the State court into the Federal court; but the writ is unnecessary, when the record of the State court is already before the Federal court. *Scott et al., Trustees, v. Clinton and Springfield R. R. Co.*, 8 Ch. Legal News, 210, *per* Drummond, J.; s. c., 6 Bissell, 529.

The writ of *certiorari* is often resorted to as the means of effecting, pursuant to law, the removal of the record of a proceeding or cause from one court to another. In England and in some of the states in this country indictments and other proceedings are removed for trial from the lower to the higher court. Bacon's Abridg. title *Certiorari*; 1 Bl. Com. 320, 321; 1 Chitty Cr. Law, 334, 571 *et seq.*, 387; *State v. Gibbons*, 1 South. (N. J.), 40, 44; *United States v. McKee*, 4 Dillon, C. C. (not yet reported); s. c., 3 Cent. L. J. 292, on motion in arrest of judgment.

Section 7 of the act of March 3, 1875, authorizing the Circuit court to issue the writ of *certiorari*, provides that it shall "command the State court to make return of the record" of the cause removed, which means an exemplified copy of the record. *United States v. McKee, supra*. And express power is given to the Circuit court "to enforce the said writ according to law."

The provision in the act of March 3, 1875, sec. 7, in respect to *certiorari*, only extends to "causes which shall be removable under *this act*." There is no similar provision as to cases removable under sec. 639 of the Revised Statutes; but there is a provision (Rev. Stats. sec. 645) allowing copies of the record in the State court to be supplied by affidavit or otherwise, on proof that the clerk of the State court, after demand and payment or tender of his legal fees, refuses or neglects to deliver certified copies of the records and proceedings of the State court in the cause. As to provisions in special cases, see Revised Statutes, secs. 641, 643; *Benchley v. Gilbert* (suit held not removable by *certiorari* under sec. 67, act of July 13, 1866), 8 Blatchf. 147.

Certiorari and habeas corpus under act of 1833, "force act," in respect to removal of causes. *Abranches v. Schell*, 4 Blatchf. 256.

SECTION XI.

AS TO VALUE.

In the REMOVAL acts to which we have referred, namely, the Revised Statutes, section 639, and the act of March 3, 1875, it is made an indispensable element of removability, that the *amount in dispute*, exclusive of costs, shall "exceed the sum or value of five hundred dollars." This language, as well as that which precedes it, is descriptive of the nature of *suits* that may be removed. The subject-matter of the dispute or of the suit must be property, or money, or some right, the value of which in money is susceptible of judicial ascertainment. The language descriptive of *suits that may be removed* excludes criminal cases and controversies relating to the custody of a child, or the right to personal freedom.⁵⁷

As to *order allowing copies* of the papers, etc., in the State court to be filed in the Federal court, where the clerk refuses to certify such copies: *Akerly v. Vilas*, 1 Abb. U. S. Rep. 284; s. c., 2 Bissell, 110 (1869); 24 Wis. 165; *Hatch v. C., R. I. & P. R. R. Co.*, 6 Blatchf. 105.

Without express authority from Congress, the Federal court can not issue a writ of *mandamus* to the State court, to require it to proceed no further in the case, and to certify the case to the Federal court. It was admitted that Congress could confer such a power, but denied that it had done so by the Judiciary Act. *Per Drummond, J., Hough v. West. Transp. Co.*, 1 Bissell, 425 (1864). Or by the act of July 27, 1866; *In re Cromie*, 2 Bissell, 160 (1869). Or by the act of July 27, 1868 (Rev. Stats., sec. 640); *Fisk v. Union Pacific B. R. Co.*, 6 Blatchf. 362 (1869). See on subject of *mandamus* and process to enforce removal of cause from State to Federal court, *Spraggins v. County Court, Cooke's Rep.* 160, *Ex parte Turner*, 3 Wall. Jr. 258, Grier, J.

Proceedings in the State court after the removal of the cause will not be stayed by writ from the Federal court; if the removal was not lawfully effected, such writ is improper; if effected, it is unnecessary. *Bell v. Dix*, 49 N. Y. 232 (1872); *Fisk v. Union Pacific R. R. Co.*, 6 Blatchf. 362. See further on this point, *post*, sec. 17 and note.

⁵⁷ *Phillips' Pr.* (2d Ed.), 82; *Lee v. Lee*, 8 Pet. 44; *Barry v. Mercien*, 5 How. 103; *Pratt v. Fitzhugh*, 1 Black. 271; *DeKrafft v. Barney*, 2 Black. 704; *Sparrow v. Strong*, 3 Wall. 97; *Gaines v. Fuentes*, Sup. Court, Oct. Term, 1875, 3 Cent. L. J. 371; s. c., 2 Otto, 10. The suits must relate to claims or property capable of pecuniary estimation. *Ib.*

It is not sufficient that the value in dispute *precisely equals* \$500; it must *exceed* that sum or amount.⁵⁸

The value of the matter in dispute for the purposes of removal is to be determined by reference to the amount claimed in the declaration, petition or bill of complaint.⁵⁹ In actions on a *money demand*, the value in dispute is the debt and damages claimed as stated in the petition or declaration, and in the prayer for judgment. For example, if the action be on a note for a fixed sum, and the principal and interest and damages do not all together exceed \$500, it is not removable, although the prayer for judgment may be for an amount greater than \$500. On the other hand, in the case supposed, though the plaintiff might have been entitled to a recovery for more than \$500, yet if the prayer for judgment be for *less* than that amount, the case could not be removed.⁶⁰

It is sufficient that the amount in dispute exceeds \$500 *at the time* when the right to a removal accrues and is applied for—and *interest*, when the right thereto exists and it is claimed, may be regarded in determining the amount or value in controversy.⁶¹ The State court decisions, proceeding on a different principle, are probably unsound.

In actions *sounding in tort* the damages laid by the plaintiff are the amount of the matter in dispute.⁶²

⁵⁸ Walker v. United States, 4 Wall. 163; W. U. Tel. Co. v. Levi, 47 Ind. 552.

⁵⁹ Gordon v. Longest, 16 Pet. 97; Kanouse v. Martin, 15 How. 198, 207; Ladd v. Tudor, 3 Woodb. & Minot, 325; Muns v. Dupont, 2 Wash. C. C. 463; Bennett v. Butterworth (detinue), 8 How. 124; Peyton v. Robertson (replevin), 9 Wheat. 527; United States v. McDowell (penal bonds), 4 Cranch, 316; Martin v. Taylor (penalty), 1 Wash. C. C. 1; Postmaster-General v. Cross (penal bond), 4 Wash. C. C. 326; King v. Wilson (illegal taxes), 1 Dillon, 555; Hartshorn v. Wright (ejectment), 1 Pet. C. C. 64; Crawford v. Burnham (ejectment), 4 Am. Law Times, 228; W. U. Tel. Co. v. Levi, 47 Ind. 552.

⁶⁰ See Lee v. Watson, 1 Wall. 337.

⁶¹ McGinnity v. White, 3 Dillon, 350; Bank etc. v. Daniel, 12 Pet. 32; Merrill v. Petty, 16 Wall. 338.

⁶² Hulsecamp v. Teel, 2 Dallas, 358; Gordon v. Longest, 16 Pet. 97; West. Union Tel. Co. v. Levi, 47 Ind. 552.

Where the right to a removal has become perfect and complete, it is not in the power of the other party to defeat it in either court by release or by amendment of petition and declaring for less than five hundred dollars.⁶³

It is made a condition of the right to an appeal or writ of error to the Supreme Court that the "matter in dispute exceeds the sum or value of two (now five) thousand dollars, exclusive of costs." The cases arising under this clause are collected and accurately stated by Mr. Phillips,⁶⁴ and will be found, in many instances, applicable to questions arising in this regard under the removal acts.

In leaving this point, we may be permitted to observe that in our judgment the most serious objection to the removal acts, as they now exist, is the small amount required to authorize a removal. In view of the inconvenience and expense of litigating in the Federal courts, held often more than one hundred miles distant from the residence of the parties; the crowded state of their dockets; and considering that removals, especially by foreign insurance and railway corporations, often have the effect to delay, if not to oppress, those having claims against them, it is quite clear that the amount to justify a removal should be enlarged, or the Federal courts multiplied, or at all events their judicial force increased.

SECTION XII.

PARTY ENTITLED TO A REMOVAL—CITIZENSHIP— CORPORATIONS—ALIENS.

Under the 12th section of the Judiciary Act, omitting the case of aliens, the right of removal is limited, as we have shown, to the non-resident defendant, when sued by a resident plaintiff. Under the act of 1866 it is limited, as we have seen, under the restrictions therein imposed, to the non-

⁶³ *Kanouse v. Martin*, 15 How. 198; *Wright v. Wells*, 1 Pet. C. C. 220; *Green v. Custard*, 23 How. 468; *Roberts v. Nelson*, 8 Blatchf. 74.

⁶⁴ *Practice of the Supreme Court*, chap. VIII.

resident defendant, and it is not given either to the resident defendant or to the resident plaintiff. Under the act of 1867 the right is given, as above shown, under the enumerated conditions, to the plaintiff *or* defendant; but in either case it is only the non-resident citizen who can remove the case.⁶⁵

Where the jurisdiction of the Federal court depends on *citizenship*, it is the citizenship of the parties to the record that is alone considered, and not of those who, although not parties, may be beneficially interested in the litigation. This rule applies to executors and administrators and trustees.⁶⁶

⁶⁵ Citizenship of a state, for the purpose of conferring Federal jurisdiction, has reference to domicile and residence, not the right of suffrage. *D'Wolf v. Rabaud*, 1 Pet. 476; s. c., *Paine C. C.* 580; *Case v. Clarke* 5 Mason C. C. 70; *Cooper v. Galbraith*, 3 Wash. C. C. 546; *Shelton v. Tiffin*, 6 How. 163; *Lanz v. Randall* (Dist. Minn., Miller, J.), 3 Cent. L. J. 688 (1876). Effect of *bona fide change of domicile*. *Jones v. League*, 18 How. 76; *Morgan's Heirs v. Morgan*, 2 Wheat. 290; *United States v. Myers*, 2 Brock. 516.

A State can not make the *subject of a foreign government* a citizen of the United States; and *resident unnaturalized foreigners* may remove causes to the Federal court on the ground that they are aliens, although by state laws they may vote at elections or hold office under the state government. *Lanz v. Randall* (Dist. Minn., Mr. Justice Miller), 3 Cent. L. J. 688 (1876); *ante*, sec. 6, *note*.

⁶⁶ If the *administrator or executor* and the defendant are citizens of the *same state*, the Federal court has no jurisdiction, although the intestate or testator was a citizen of a different state. *Coal Co. v. Blatchford*, 11 Wall. 172; *Dodge v. Perkins*, 4 Mason C. C. 435; *Childress v. Emory*, 8 Wheat. 642; *Carter v. Treadwell*, 3 Story C. C. 25; *Green's Administratrix v. Creighton*, 23 How. 90. If the action is by or against the deceased, the executor or administrator may prosecute or defend it without reference to his own citizenship. *Clarke v. Mathewson*, 12 Pet. 164; s. c. below, 2 Sumner C. C. 262. *The citizenship of executors* is determined by the state of which they are citizens; and the circumstance that they have taken out letters in another state does not make them citizens of such state. *Amory v. Amory*, 36 N. Y. Superior Court Rep. (4 Jones & Spencer), 520 (1874); *Geyer v. Life Ins. Co.*, 50 N. H. 224 (1870). If he remove to another state and become, in respect of jurisdiction, a citizen thereof, he may sue in the Circuit court of the State in which his letters were granted. *Rice v. Houston*, 13 Wall. 66.

Citizenship of trustees. *Bonnafée v. Williams*, 3 How. 574; *Coal Co. v. Blatchford*, 11 Wall. 172; *Gardner v. Brown*, 21 Wall. 36; *Thompson v.*

Corporations created by the states are within all the removal acts under consideration, and after much uncertainty and fluctuation of opinion in the Supreme Court of the United States, the settled rule now is that a corporation, for all purposes of Federal jurisdiction, is conclusively considered as if it were a citizen of the state which created it, and no averment or proof as to citizenship of its members elsewhere is competent or material.⁶⁷

The same principle applies to *public and municipal corporations*—they are for jurisdictional purposes necessarily

Railroad Companies, 6 Wall. 134; Weed Sewing Machine Co. v. Wicks *et al.*, 3 Dillon, 261; Bushnell v. Kennedy, 9 Wall. 391; Act June 1, 1872, 17 Stats. at Large; 197, sec. 5; Rev. Stats., sec. 914; Wood v. Davis, 18 How. 467; Knapp v. Railroad Co., 20 Wall. 117. Compare Suydam v. Ewing, 2 Blatchf. 359, as to which *quære*.

Who are to be regarded as parties to a bill in equity filed by the complainant in behalf of himself and *such others as might come in and become parties*, see Hazard v. Durant, 9 R. I, 602 (1868).

⁶⁷ Railroad Co. v. Harris, 12 Wall. 65, 81; Railway Co. v. Whitton, 13 Wall. 270, 285; Louisville etc. R. R. Co. v. Letson, 2 How. 497; Marshall v. The Baltimore & Ohio Railroad Co., 16 How. 314; The Covington Drawbridge Company v. Shepherd *et al.* 20 How. 232; Ohio & Mississippi Railroad Company v. Wheeler, 1 Black, 286; Trust Co. v. Maquillan (act of 1867) 3 Dillon, 379; Minnett v. Milwaukee & St. Paul Railway Co. (act of 1867), 3 Dillon, 460. As to the effect on Federal jurisdiction (where it is dependent upon the citizenship of the parties) of *charters granted by different states to the same company* or to companies constructing the same line of road, and as to the *effect of consolidation* on the jurisdiction of the Federal courts, the following are the principal cases: Ohio & Miss. R. R. Co. v. Wheeler, 1 Black, 286; Balt. & Ohio R. R. Co. v. Harris, 12 Wall, 65; Ch. & N. W. R. R. Co. v. Whitton, 13 Wall. 270; Williams v. M. K. & T. Railway Co., 3 Dillon, 267. See also, Marshall v. B. & O. R. R. Co., 16 How. 314; Balt. & O. R. R. Co. v. Gallahue's Administrator, 12 Grattan; 658; Goshorn v. Supervisors, 1 West. Va. 308; Minot v. Phila. Wil. & B. R. R. Co., 2 Abb. U. S. R. 323. See Chicago & Northwestern Railroad Company v. Chicago & Pacific Railroad Company, 8 Chicago Legal News (Nov. 14, 1874), 57, (s. c. 6 Bissell, 219), decided by Circuit Judge Drummond, as to the effect of consolidation under charters of different states and the citizenship of the consolidated company.

What is a sufficient statement and averment of the *citizenship of corporations to sustain Federal jurisdiction*: Express Co. v. Kountze, 8 Wall. 342; Ins. Co. v. Francis, 11 Wall. 210; Manuf. Bank v. Baack, 8 Blatchf. 137; s. c., 2 Abb. U. S. Rep. 232; Covington Drawbridge Co. v. Shep-

citizens of the state under whose laws they are created and organized.⁶⁸

A *corporation of another state* may remove a cause commenced by attachment of property, although the action could not, by reason of a citizenship in a legal sense out of the district, and inability to serve it within the district, be commenced by original process in the Circuit court of the United States;⁶⁹ and the right to a removal in such a case is not lost by reason of such corporation having an office for the transaction of business in the state in which the suit is

herd, 20 How. 227; *Piquignot v. Pa. R. R. Co.*, 16 How. 104; *Ohio & Miss. R. R. Co. v. Wheeler*, 1 Black, 286.

As to the right of *joint stock companies, partly but not fully endowed with the attributes of corporations*, to sue in the Federal court, or remove cases to the Federal court on the ground of citizenship or alienage, there is some diversity of judicial decision. The leading cases on this point are: *Liverpool Ins. Co. v. Massachusetts*, 10 Wall. 566; *Penn. v. Quicksilver Mining Co.*, 10 Wall. 553; *Dinsmore v. Phila. etc. R. R. Co.* (McKenna, Circuit Judge), 3 Cent. L. J. 157; *Maltz v. Am. Express Co.* (Brown, J.), 3 Cent. L. J. 784.

⁶⁸ *Cowles v. Mercer County*, 7 Wall. 118; *Barclay v. Levee Commrs.* 1 Woods C. C. 254. In *McCoy v. Washington County*, 3 Wall. Jr. C. C. 381, it was contended "that the County of Washington, merely a subordinate political division of the State of Pennsylvania, is not a citizen of this state, within the meaning of the Constitution or the act of Congress, and therefore not suable in this court." "To this we answer," says Grier, J., "that though the metaphysical entity called a corporation may not be physically a citizen, yet the law is well settled, that it may sue and be sued in the courts of the United States, because it is but the name under which a number of persons, corporators and citizens may sue and be sued. In deciding the question of jurisdiction, the court look behind the name, to find who are the parties really in interest. In this case the parties to be affected by the judgment are the people of Washington County. That the defendant is a municipal corporation and not a private one, furnishes a stronger reason why a citizen of another state should have his remedy in this court, and not in a county where the parties, against whom the remedy is sought, would compose the court and jury to decide their own case. This point is therefore overruled." A state statute can not limit the liability of a municipal corporation to be sued in the courts of a state, so as to affect the Federal jurisdiction. *Cowles v. Mercer County*, 7 Wall. 118; *Railway Co. v. Whitton*, 13 Wall. 270.

⁶⁹ *Bliven v. New. Eng. Screw Co.*, 3 Blatchf. 111; *Barney v. Globe Bank*, 5 *ib.* 107; *Sayles v. N. W. Ins. Co.*, 2 Curtis, 212.

brought.⁷⁰ Nor can such a corporation be deprived of the right of removal by state legislation.⁷¹

Incorporated bodies chartered by foreign countries may remove cases under the provisions as to *aliens*.⁷²

For jurisdictional purposes *national banks* are deemed citizens of the state in which they are located,⁷³ and they may sue in the Circuit court, although the defendants are citizens of the same state in which the bank is established.⁷⁴ The act of July 27, 1868 (Revised Statutes, sec. 640, *ante*, sec. 2, note), expressly excludes national banks from its provisions; but this has been considered not to prevent the right of removal in their favor, if their case is within any of the other removal acts.⁷⁵

⁷⁰ *Hatch v. Chicago etc. R. R. Co.*, 6 Blatchf. 105. The right of a foreign corporation to remove a cause is not affected by the legislature of the state authorizing *service of process on its agent* in the state. *W. U. Tel. Co. v. Dickinson*, 40 Ind. 444 (1872); *Hobbs v. Manhattan Ins. Co.*, 56 Maine, 417; *Morton v. Mut. Life Ins. Co.*, 105 Mass. 141 (1870). A foreign corporation, sued by its own assent in another state, is notwithstanding a foreign corporation, and for all purposes of Federal jurisdiction a citizen of the state which created it. *Pomeroy v. N. Y. & N. H. R. R. Co.*, 5 Blatchf. C. C. 120; *Hatch v. Ch., R. I. & P. R. R. Co.*, 6 Blatchf. 105.

⁷¹ *Chicago etc. Railway Co. v. Whitton's Admr.*, 13 Wall. 270; *ante*, sec. 3 and cases cited.

⁷² *Terry v. Ins. Co.*, 3 Dillon, 408; 1 Kent's Com. 348; see also Angell & Ames on Corporations, secs. 377, 378, and 1 Abbott's U. S. Practice, 216; *Fisk v. Ch. etc. Railroad Co.*, 53 Barb. 472; 3 Abb. Pr. Rep. (N. S.) 453; *King of Spain v. Oliver* 2 Washington C. C. 429.

⁷³ *Chatham Nat. Bank v. Mer. Nat. Bank*, 1 Hun, (N. Y.), 702. See, also, to the effect that for jurisdictional purposes national banks are citizens of the state where they are located: *Davis v. Cook*, 9 Nev. 134 (1874), following *Manuf. Nat. Bank v. Baack*, 2 Abb. U. S. Rep. 232; s. c., 8 Blatchf. 137, and approving of the reasoning of Blatchford, J. Same point, *Cook v. State National Bank*, 52 N. Y. 96 (1873); s. c. below, 50 Barb. 339, 1 Lans. 494, holding that national banks are citizens of the state in which they are located, and may apply as such for the removal of causes.

⁷⁴ *Union Nat. Bank v. Chicago*, 3 Ch. Legal News, 369; *Bank of Omaha v. Douglas County*, 3 Dillon C. C. 298; *Com. Bank v. Simmons*, 6 Ch. Legal News, 344.

⁷⁵ In the *Chatham Nat. Bank of New York v. Mer. Nat. Bank of West. Va.*, 1 Hun (N. Y.), 702, a national bank was regarded as a citizen of the

But there is a distinction between National Banking Associations and the *Receivers* of such associations; neither under the Revised Statutes (sec. 640), nor under the National Banking Act (sec. 57), have such receivers as such the right to remove cases from the State courts into the Federal courts.⁷⁶

SECTION XIII.

THE TIME WHEN THE APPLICATION MUST BE MADE.

Under the 12th section of the Judiciary Act (now Revised Statutes, sec. 639, sub-division 1), the application must be made by the defendant "at the *time of entering his appearance* in the State court." Under this provision the defendant must promptly avail himself of this right, and he waives it if he demurs, or pleads, or answers, or otherwise submits himself to the jurisdiction of the State court.⁷⁷

state in which it is located and does business, and the national bank of another state may remove a suit in which it is a defendant, if the case is otherwise within the 12th section of the Judiciary Act, and the application is made in time, *i. e.*, at the time of "entering its appearance;" and this, notwithstanding the act of July 27, 1868 (15 Stats. at Large, 226; Rev. Stats., sec. 640), excludes national banking associations from its provisions—the latter being considered as providing for a new class of cases, and not affecting the right of removal given by preceding legislation.

⁷⁶ *Bird's Executors v. Cockrem, Receiver*, 2 Woods C. C. 32, Bradley, J.

⁷⁷ *West v. Aurora City*, 6 Wall. 139; *Sweeney v. Coffin*, 1 Dillon, 73; *Webster v. Crothers*, 1 Dillon, 301; *Johnson v. Monell*, 1 Woolw. 390; *McBratney v. Usher*, 1 Dillon, 367, 369; *Robinson v. Potter* (too late after reference and continuance), 43 N. H. 188; *Savings Bank v. Benton*, 2 Metc. (Ky.) 240; *supra*, sec. 5, and cases cited.

As to the right of *different* defendants to remove at *different times*, see *Smith v. Rines*, 2 Sumn. 338; *Ward v. Arredondo*, 1 Paine, 410; *Beardsley v. Torrey*, 4 Wash. C. C. 286; *Field v. Lownsdale*, 1 Deady, 288; *Fisk v. Union Pacific R. R. Co.*, 8 Blatchf. 243, 299; *supra*, sec. 5, and cases cited.

The State court can not restore right of removal by allowing an ap-

Under the acts of 1866 and 1867 (now Revised Statutes, sec. 639, sub-divisions 2 and 3), the time is enlarged, and the petition for the removal may be made "at *any time before* the trial or final hearing of the suit" in the State court. The word "trial" refers to cases at law—"hearing," to suits in equity.⁷⁸ Under this language the petition for the removal *may*, it is certain, be made at any time before entering upon the final trial, or the hearing on the merits; and it *must* be made before *final judgment in the court of original jurisdiction*, and it is too late to make it after the cause has reached, and is pending in the State appellate court.⁷⁹

"Before final hearing or trial clearly means," says Mr.

pearance to be entered *nunc pro tunc*. Ward v. Arredondo, 1 Paine, 410; Gibson v. Johnson, Pet. C. C. 44.

⁷⁸ Vannevar v. Bryant, 21 Wall. 41, 43, *per* Waite, C. J.; s. c. below, Bryant v. Rich, 106 Mass. 180.

⁷⁹ Stevenson v. Williams, 19 Wall. 572; Vannevar v. Bryant, 21 Wall. 41, 43; Waggener v. Cheek, 2 Dillon, 560; Kellogg v. Hughes, 3 Dillon, 357; Dart v. McKinney, 9 Blatchf. 359; Johnson v. Monell (change of residence pending suit), 1 Woolw. 390; Minnett v. Milwaukee & St. Paul Railway Co., 3 Dillon, 460, denying Galpin v. Critchlow, 13 Am. Law Reg. (N. S.), 137; s. c., 112 Mass. 339, and Whittier v. Hartford Ins. Co., 14 Am. Law Reg. (N. S.), 121; s. c. 55 N. H. 141; see Ins. Co. v. Dunn, 19 Wall. 214, 225; Akerly v. Vilas, 1 Abb. U. S. Rep. 284; s. c. 2 Bissell, 110; Murray v. Justices, 9 Wall. 274; Miller v. Finn, 1 Neb. 254 (1867); Price v. Sommers (N. D. Ohio, Welker, J.), 8 Ch. Legal News, 290 (1876); Fasnacht v. Frank (U. S. Sup. Court, Oct. 1874), 23 Wall. 416; Craigie v. McArthur, 9 Ch. Legal News, 156.

What was a "final trial" within the meaning of the act of 1867 (Rev. Stats., sec. 639, cl. 3), was considered in West Virginia in a case of unlawful detainer, commenced before a justice of the peace, where judgment went against a citizen of another state, who appealed to the Circuit court, and then applied to remove the case to the Federal court under the act of 1867. The lower court denied the application, and rendered judgment against the defendant, and on appeal the Court of Appeals reversed the judgment, resting its decision upon two grounds: 1. No motion to remove could have been made before the justice, that not being a "State court" within the meaning of the act of Congress. 2. The case on appeal from a justice is to be tried *de novo* in the Circuit court the same as if never tried, and hence there was no "final trial" within the intent of the act of Congress. Rathbone Oil Co. v. Rauch, 5 West Va. 79 (1871).

Justice Field, "before final judgment in the court of original jurisdiction, where the suit is brought. Whether it may not mean still more—before the hearing or trial of the suit has commenced, which is followed by such judgment—may be questioned; but it is unnecessary to determine that question in this case."⁸⁰ It would seem, however, that it would be too late to defer the application, until the trial was actually entered on.⁸¹

Although there is some conflict between the State and Federal courts on the point, yet the weight of the cases and the authoritative view is, that if the trial court has wholly *set aside a verdict and granted a new trial*, or if the State appellate court has *wholly reversed the judgment* and remanded the case to the court of original jurisdiction for a trial *de novo*, then, in either event, it is not too late under the act of 1866 or 1867, to apply to remove the cause, as it is in the same posture as before the first trial or hearing was had.⁸²

⁸⁰ *Stevenson v. Williams*, *supra*; *Beery v. Irick*, 22 Gratt. (Va.), 487 (1872); *Williams v. Williams*, 24 La. Ann. 55; *Douglas v. Caldwell*, ("final hearing" what?) 65 N. C. 248 (1871).

⁸¹ Application for removal, under the acts of 1866 and 1867, must be made *before trial or hearing commences*; it is too late if made during the progress of the trial, and this principle is not varied by the fact, that during the trial an amendment of the declaration was allowed on which issue was not joined at the time the petition to remove the case was filed. *Adams Express Co. v. Trego*, 35 Md. 47 (1871); see also *Lewis v. Smythe* (Woods, Circuit Judge), 2 Woods C. C. 117 (1875), referred to *infra*.

⁸² *Vannevar v. Bryant*, 21 Wall. 41, 43, *per* Waite, C. J.; s. c., 106 Mass. 180; *Stevenson v. Williams*, 19 Wall. 572; *Waggenger v. Cheek*, 2 Dillon, 560; *Kellogg v. Hughes*, 3 Dillon, 357; *Dart v. McKinney*, 9 Blatchf. 359; *Johnson v. Monell* (change of residence pending suit), 1 Woolw. 390; *Minnett v. Milwaukee & St. Paul Railway Co.*, 3 Dillon, 460, denying *Galpin v. Critchlow*, 13 Am. Law Reg. (N. S.) 137; s. c., 112 Mass. 339, and *Whittier v. Hartford Ins. Co.*, 14 Am. Law Reg. (N. S.) 121; s. c., 55 N. H. 141. See *Ins. Co. v. Dunn*, 19 Wall. 214, 225; *Akerly v. Vilas*, 1 Abb. U. S. Rep. 284; s. c., 2 Bissell, 110; *Murray v. Justices*, 9 Wall. 274; *Fasnacht v. Frank*, U. S. Sup. Court, Oct. 1874, *supra*; *Dart v. Walker*, 4 Daly (N. Y.), 188 (1871), also holding that under act of 1866 or 1867 removal may be had after a reversal and order for a new trial.

The cases in the State courts holding a different doctrine from that stated in the text are not sound expositions of the statute. The follow-

The case of the Insurance Co. v. Dunn (19 Wall. 214) affords a striking illustration of the meaning of the phrase, "*final judgment*" in the acts of 1867. The plaintiff in that case had a verdict and judgment thereon in one of the courts of Ohio. The defendant (the Insurance Company) under the statute of the State, applied for a new trial, and gave bond in that behalf. This had the effect, under the statute of the state, *to vacate the verdict and judgment* as if a new trial had been granted, except that *lien of the judgment* are some of the more important of these: Hall v. Ricketts, 9 Bush (Ky), 366 (1872); Akerly v. Vilas, 24 Wis. 165; Home Life Ins. Co. v. Dunn, 20 Ohio St. 175; Crane v. Reeder, 28 Mich. 527 (1874); Galpin v. Critchlow, 112 Mass. 339 (1873).

Where the Supreme Court of a State has reversed the decree of the lower court and remanded the cause *with instructions to dismiss the bill*, it is too late to apply for a removal to the Federal court under the act of March 2, 1867. Boggs v. Willard, 3 Bissell, 256 (1872), Blodgett, J. But where the State Supreme Court has ordered a new trial, the plaintiff may dismiss and commence in the Federal court. Hazard v. Chicago etc. R. R. Co., 4 Bissell, 453. Effect of the decision of the State Supreme Court in such a case considered. *Ib.*

The case of McKinley v. Chicago & N. W. Railway Co., now in the Supreme Court of the United States on a writ of error to the Supreme Court of Iowa, presents a new and interesting point. The case in the State court was for personal injury. The plaintiff had a verdict and judgment below. The railway company appealed to the Supreme Court of the State, which reversed the judgment and ordered a new trial, and issued its *procedendo*, which was filed within sixty days in the lower court. Thereupon the railway company in due form made and filed its petition and bond for removal of the cause to the Federal court under the acts of 1867 and 1875. This was in vacation, and there was no order upon it. By the law of the State, causes in the Supreme Court are to be remanded for a new trial, if a new trial be ordered (Code, sec. 3206), and there is a provision for recalling a *procedendo*, if a petition for rehearing be filed in sixty days (Code, sec. 3201). After the petition and bond for removal had been filed as above, but *within* the sixty days, a petition for rehearing was filed in the Supreme Court of the State, and the *procedendo* was recalled. The railway company moved the State Supreme Court to dismiss the petition for rehearing, because the court had no further jurisdiction of the cause, inasmuch as the same was duly removed to the Federal court, after the *procedendo* was filed and before it was recalled. The State Supreme Court overruled the motion, and subsequently granted the rehearing and rendered judgment against the railway company, which has sued out a writ of error, which is now pending in the Supreme Court of the United States.

ment remained as security for the plaintiff. When the case was in this *status*, the company applied to remove the cause under the act of 1867, and it was held that there had been no *final* trial, that the application was in time, and that the suit was removable; and the subsequent judgment in the State court was reversed by the Supreme Court of the United States.⁸³

But a cause can not be removed where a verdict has been rendered, and a motion is *pending* to set the verdict aside. Such a motion must be disposed of, and be granted, so that the right to a second trial is complete, before the cause can be transferred, since, says the Chief Justice, "every trial of a cause is *final* until, in some form, it has been vacated. Causes can not be removed to the Circuit court for a review of the action of the State court, but only for trial. The Circuit court can not, after a trial in a State court, determine whether there shall be another. That is for the State court.

⁸³In Ohio, where a case is commenced in the Court of Common Pleas, where a trial is had, and an appeal taken to the District court of the State, it is too late, *under the act of 1875*, to apply to remove the case to the Federal court. Welker, J., distinguishes this case from *Ins. Co. v. Dunn*, 19 Wall. 214, and applies the doctrine of *Stevenson v. Williams*, 19 Wall. 572, and regards the hearing in the Common Pleas as "final" within the meaning of the removal act, although the effect of the appeal is to vacate the decree and entitle the party to a trial *de novo*. *Price v. Sommers* (North. Dist. Ohio), 8 Ch. Legal News, 290 (1876). Similar principle in respect to attempt to remove from an appellate court a case which originated in the Probate court, after a decision and appeal: it was held not removable. *Craigie v. McArthur* (Dist. Minn., Dillon and Nelson, JJ.), 9 Ch. Legal News, 156 (1876); s. c., 4 Cent. L. J. 237; s. c., 15 Alb. L. J. 121. The plaintiff had a judgment on a verdict; the defendants sued out a writ of review and then applied, the judgment remaining unreversed, to remove the cause under the Revised Statutes, sec. 639, cl. 3; held, under the legislation of the state as to effect of the first judgment and of the proceeding for review, and distinguishing the case from *Ins. Co. v. Dunn* (19 Wall. 214), that the cause was not removable at that stage. *Whittier v. Hartford Fire Ins. Co.*, 55 N. H. 141 (1875), commented on, and its principle applied to a case where the application for removal was made after verdict set aside and a new trial granted. *Chandler v. Coe*, 56 N. H. 184. *Contra*, *Minnett v. Mil. & St. Paul Railroad Co.*, 3 Cent. L. J. 281; s. c., 3 Dillon, 460, and see cases cited *ante*.

To authorize the removal, the action must, at the time of the application, be actually pending for trial.”⁸⁴

Under the acts of 1866 and 1867, it is sufficient, *it seems*, as respects citizenship, that the defendant applying for the removal is, *at the time* of filing his petition therefor, a citizen of another state, and the plaintiff a citizen of the state in which the suit is brought.⁸⁵

One of several defendants sued as *copartners* may, if the other requisites exist, have the cause removed into the Federal court, so far as concerns himself, under the act of 1866.⁸⁶

Under the act of March 3, 1875 (sec. 3), the time for the removal is greater than under the Judiciary Act, but not so great as under the acts of 1866 and 1867 last noticed. The act of 1875 requires the petition in the State court to be made and filed therein “before or at the term at which such cause *could be first tried*, and before the trial thereof.” The word term as here used means, according to the construction which it has received in the 8th judicial circuit, the term at which, under the legislation of the state and the rules of practice pursuant thereto, the cause is first triable, *i. e.*, subject to be tried on its merits; not necessarily the term when, owing to press of business or arrearages, it may be first reached, in its order, for actual trial. This act gives the right of removal to either party—the resident as well as the non-resident party—and no affidavit of prejudice is required; and it was the obvious purpose of Congress by the use of the words “*before or at, etc.*, the term at which the cause *could be first tried*,” etc., to require the election to be taken at the first term at which, under the law, the cause was triable on its merits. The judicial construction elsewhere of the act of 1875 is in accordance with these views.⁸⁷

⁸⁴ *Vannevar v. Bryant*, 21 Wall. 41, 43; s. c., 106 Mass. 180; see *Whittier v. Hartford Ins. Co.* 55 N. H. 141.

⁸⁵ *McGinnity v. White*, 3 Dillon, 350. *Contra*, *Dart v. Walker*, 4 Daly (N. Y.), 188 (1871). See *infra*, sec. 14.

⁸⁶ *Ib.*; and see *supra* sec. 6 and sec. 9, note.

⁸⁷ *Ames v. Colorado Central R. R. Co.* (Hallett, J., February. 1877), 4 Cent. L. J. 199.

The decisions under the acts of 1866 and 1867, that a removal may be applied for, after a verdict has been set aside and a new trial granted, or the judgment of the trial court has been wholly reversed and a trial *de novo* awarded, are, it is supposed, inapplicable under the act of 1875, which requires the petition for the removal to be made "before or at etc., the term at which the cause could be *first tried* and before the trial thereof." It is clearly too late to apply for the removal after a trial has once begun, although it may result in a mistrial, or in a verdict or judgment that may be set aside with an order for a new trial.⁸⁸ Accordingly it has

"We understand that Judge Davis, when sitting as circuit justice for the district of Indiana, held that the application for removal must be made at the first term at which the cause could be put at issue, and before the trial thereof." Buskirk's Indiana Practice, 459.

A cause was at issue and could have been tried, but *by consent was continued*. Judge Drummond held, under the act of 1875, that it was too late to remove the case at a subsequent term, as the continuance was neither the act of the law nor of the court. *Scott et al., Trustees, v. Clinton & Springfield R. R. Co.*, 8 Chicago Legal News, 210; s. c., 6 Bissell, 529, where the case thus decided is referred to and distinguished.

A *chancery cause* can not be tried until the issues are made up;—if there is no delay in completing the issues on the part of the applicant for the removal, the application is in time, if made before the lapse of a term at which the cause could have been tried. Whether laches in making up issues will defeat right of removal, if removal be applied for before the issues are completed, *quære?* *Scott et al., Trustees, v. Clinton & Springfield R. R. Co.*, 8 Chicago Legal News, 210; s. c., 6 Bissell, 529, Drummond, J.

Where a replication under the local law and practice is necessary to complete the issue, and where there is no default in making up the issues by the party who applies for a removal of the cause, no term has passed at which the cause could have been tried within the meaning of the act of March 3, 1875, sec. 3. *Mich. Central R. R. Co. v. Andes Ins. Co.* (S. D. Ohio, Swing, J.), 9 Ch. Legal News, 34. In this case, Swing, J., approves of the construction of the act of 1875, in respect to the time of removals given by Drummond, Circuit Judge, in *Scott et al., Trustees, v. Clinton etc. R. R. Co.*, *supra*.

⁸⁸ A party entitled to a removal of a cause, who proceeds to trial without applying for a transfer to the Federal court, is not, under the act of 1875, entitled to a removal at a subsequent term, although a new trial may have been granted him; in this respect the act of 1875 is different from the acts of 1866 and 1867. *Young v. Andes Ins. Co.* (S. D. Ohio, Swing, J.), 3 Cent. L. J. 719 (1876).

been held, under the act of March 3, 1875, that the application for removal must be made, before the trial on its merits, *or on a question which results in a final judgment or decree*, commences. It is therefore too late to apply for the removal after the pleadings have been read and the evidence submitted, and before the argument has begun.

Where the only objection in the Federal court to the removal is *that the application was not made in the State court in time*, this objection may undoubtedly be *waived* by acquiescence, or even the failure of the other party to make it the ground of an objection to the jurisdiction of the Federal court in proper time; and it will be waived, we

⁸⁹ *Lewis v. Smythe* (Woods, Circuit Judge), 2 Woods C. C. 117 (1875). Construing the word "trial," as used in section 3 of the act of 1875, in reference to the time when the removal must be applied for, Woods, Circuit Judge, in *Lewis v. Smythe*, 2 Woods C. C. 117, 118, 119, says: "By the word 'trial,' as used in the statute, I do not understand the argument, investigation or decision of a question of law merely, unless it is decisive of the case, and the question results in a final judgment or decree. The decision of the court on a demurrer, for instance, or on exceptions to the sufficiency of a plea, which is followed by amendments or new pleadings, and which does not end the case, is not the trial meant by the statute." The trial meant is one which "involves the facts of the case; and whenever the investigation of the facts of a case simply, or the facts in connection with the law is entered upon by the court alone, or by the court and jury, the trial may be said to have begun." The petition must be filed not only before "the trial is completed and ended, but before it commences."

Construing the word "trial" in the act of 1875, sec. 3, see *Price v. Sommers* (North. Dist. Ohio), cited *supra*, 8 Ch. Legal News, 290.

In *Ames v. Colorado Central R. R. Co.* (Dist. Col.; Dillon & Hallett, JJ.) 4 Cent. L. J. 199, it was ruled, under the act of 1875, that the application to remove a cause must be made to the State court at or before the term in which according to the local law and practice of the court, the cause could have been finally heard. Accordingly where issue was joined nearly one month before the end of a term of the State court, and it does not appear but that a final hearing could have been had at that term, an application thereafter made to remove the cause under the act of 1875 is too late. It was also decided that the act of 1875, which provides that any suit "now pending or hereafter brought in any State court", of the description therein specified, may be removed into a Federal court, is not applicable to a suit brought in a *Territorial* court, although on the admission of the Territory as a State such suit passed into the jurisdiction of a State court. *Ib.*

think, unless the objection be made by the party entitled to make it, before he takes any affirmative action in the Federal court, or voluntarily submits himself to its action.⁹⁰ In one case, the mere failure to move to remand at the same term at which the record was filed, the party making the motion not having taken any steps in the cause after its removal, was held not to preclude making the objection at the next term.⁹¹

The act of March 3, 1875, sec. 2, extends, *inter alia*, to "any suit * * now pending;" and by section 3, the petition for removal must be filed in the State court "before or at the term at which said cause could be first tried, and before the trial thereof." It has been contended that the general language of the act "now pending," does not include cases, where prior to the passage of the act a term of the State court had passed, at which the cause might have been tried, though it was not; nor to cases where there had been a trial prior to the passage of that act, and a new trial had been ordered, and the cause was pending for such retrial when the act took effect. But the Federal Circuit courts have uniformly, and we think, properly decided otherwise, and have held that causes which might have been tried before the passage of the act of March 3, 1875, but were not, and which were pending for trial when that act went into operation, as well as causes once tried, but in which a new trial had been ordered, and which were pending, ready for retrial when the act took effect, are re-

⁹⁰ The objection that the application to remove the cause was not made in time may be *conclusively waived* by submitting to the jurisdiction of the Circuit court by taking testimony and by delaying the objection for an unreasonable time. *French v. Hay*, 22 Wall. 244; *Ames v. Colorado Central R. R. Co.* (Dist. Col.), 9 Ch. Legal News, 132, (1876); *s. c.*, 4 Cent. L. J. 199; *Young v. Andes Ins. Co.*, (S. D. Ohio; *Swing J.*), 3 Cent. L. J. 719, (1876).

⁹¹ See opinion of Yaple, J., in *Kaufman v. McNutt*, (Sup. Court of Cin.), 3 Cent. L. J. 408; *Kain v. Texas Pacific R. R. Co.*, (under act of July 27, 1868, East. Dist. Texas, *Duval, J.*), 3 Cent. L. J. 12 (1875); *Carrington v. Florida R. R. Co.* (Benedict, J.), 9 Blatchf. 467 (1872).

movable,⁹² if the application therefor be made after the passage of the act and within the time therein required.⁹³

SECTION XIV.

MODE OF MAKING APPLICATION FOR REMOVAL—BOND, ETC.

Under the Revised Statutes, sec. 639, the applicant for the removal must file his petition therefor, stating the grounds for the removal, and offer in the State court good and sufficient surety for his entering in the Circuit court, on the first day of its next session, copies of the process [proceedings] against him, and of all pleadings, depositions and other proceedings in the cause, etc. This petition is not required to be verified.

Under the act of 1867 (Revised Statutes, sec. 639, subdivision 3), there is required in addition to the petition for removal an *affidavit of prejudice or local influence*, which, wherever possible, should be made by the party himself; or if the petition is on behalf of a corporation, by the president or managing or other proper officer, or by some person authorized to control the case.⁹⁴ The decisions upon the

⁹² Crane v. Reeder, (Emmons, Circuit Judge), 15 Albany L. J. 103, denying correctness of the contrary decision of the Supreme Court of Michigan, 28 Mich. 527; Andrews, Exec. v. Garrett, (Swing, Dist. Judge), 3 Cent. L. J. 797; s. c. Ch. Legal News (January 8, 1876), p. 132; Mer. and Manuf. Bank v. Wheeler, (Johnson, Circuit Judge), 3 Cent. L. J. 13; Hoadley v. San Francisco, (Sawyer, Circuit Judge), 8 Chicago Legal News, 134. The decisions in the 8th judicial circuit have always been in accordance with this view.

⁹³ Ames v. Colorado Central R. R. Co., (Dillon & Hallett, JJ.) Feb. 1877, cited *supra*.

⁹⁴ See Anon., 1 Dillon, 298, note; Trust Co. v. Maquillan, 3 Dillon, 379, 380, where Mr. Justice Miller is reported as saying: "I am not impressed with the soundness of the argument that, because corporations can not make an affidavit, except through the proper officers, they were not within the contemplation of Congress. I think that the proper officers of corporations may make the necessary affidavit to procure the removal."

The president, and perhaps the general manager of a railway com-

point whether an attorney may make the affidavit in any case, or what officers of a corporation may make it, are few.

It is not necessary to state in the affidavit the reasons or facts showing the local influence or prejudice; for this is not a traversable matter either in the State or Federal court.⁹⁵

As the party himself is a non-resident and may not be as well advised as his local agent or attorney as to the existence of local influence or prejudice, there would seem to be no reason for requiring the affidavit in all cases to be made by the party; and some parties, as infants or persons *non compos mentis*, could not make it. If an attorney or agent makes the affidavit, it is good practice to state why it is not made by the party himself.

Under the act of March 3, 1875, the removal is effected

pany, is *prima facie* authorized to make the required affidavit in such a case. *Minnett v. Milwaukee etc. Railway Co.*, 3 Dillon C. C. 460 (1875), *Nelson, J.*; s. c., 13 Alb. Law J. 254. In *Kain v. Texas Pacific R. R. Co.*, 3 Cent. L. J. 12, the petition for removal was verified by the solicitor of the corporation defendant, authorized to appear and conduct suits for it in the state of Texas; no question was made as to his authority or right to file and verify the petition, which was under the act of July 27, 1868. (Revised Statutes, sec. 640.)

The *superintendent* of a railroad company having, as incident to his office as such, no authority to represent the company in judicial proceedings, the Supreme Court of Massachusetts decided that such an officer, unless specially authorized by the corporation, has no power to make the affidavit of local influence or prejudice required by the act of 1867, and on this ground held, that the State court rightfully refused to transfer the cause. *Gray, C. J.*, observed: "The petition may doubtless be signed, and the affidavit made by some person authorized to represent the corporation. But the authority of any person assuming to represent it must appear. No officer of a corporation, unless specially authorized, has power to bind the corporation, except in the discharge of his ordinary duties." *Mahone v. Manchester etc. R. R. Corp.*, 111 Mass. 72 (1872).

The *affidavit* of local prejudice or influence under the act of 1867 *may be taken and certified* in conformity with the laws of the state, as there is no act of Congress regulating this subject. *Bowen v. Chase*, 7 Blatchf. 255.

⁹⁵ *Anon.*, 1 Dillon, 298, note; *Meadow Valley Mine Co. v. Dodds*, 7 Nev. 143.

by the proper party making and filing, in the State court, a petition in the suit to be removed, setting forth therein the grounds for the removal. This petition is not required to be verified.⁹⁶ Petitions for removal usually state not only the grounds for the removal arising from citizenship or the nature of the subject-matter, but also that the amount in dispute exceeds \$500. Where, however, the amount is shown by the pleadings in the case to exceed this sum, it is not necessary, although it is not improper, to make a statement in the petition for the removal as to the sum or value in dispute.⁹⁷ The petition for removal should be carefully framed, and in removals under the Revised Statutes, sec. 639, the prudent practitioner will follow the exact language of the statute in stating the grounds for the removal.⁹⁸

It has been decided by some of the State courts that the petition for the removal must expressly state that the parties were citizens of the respective states *at the time the suit was commenced*, and that it is not sufficient to state it in the present tense, or as of the time when the petition for removal was made or filed.⁹⁹ This view is open to some doubt. It overlooks the purpose of the Constitution and of Congress in providing for removals, which was to give a resort by the non-resident party to a tribunal in which the citizen of the state should have no advantage over him. It is inconsistent with several adjudications under the latter acts.¹⁰⁰ Whatever may be the law on the point, the careful attorney will state

⁹⁶ *Connor v. Scott*, 3 Cent. L. J. 305; *Merchants' etc. Bank v. Wheeler*, 3 Cent. L. J. 13, *per* Johnson, Circuit Judge.

⁹⁷ *Abranches v. Schell*, 4 Blatchf. 256; *Turton v. U. P. R. R. Co.*, 3 Dillon, 366.

⁹⁸ *Railway Co. v. Ramsey*, 22 Wall. 328, where the requisites, function and effect of the petition for removal are tersely stated by the Chief Justice. *Amory v. Amory*, 36 N. Y. Sup. Ct. Rep. 520.

⁹⁹ *Pechner v. Phoenix Ins. Co.*, N. Y. Court of Appeals, May, 1875; s. c., 6 Lans. 411; *Holden v. Putnam Fire Ins. Co.*, 46 N. Y. 1; *Indianapolis etc. R. R. Co. v. Risley*, 50 Ind. 60; *Savings Bank v. Benton*, 2 Metc. (Ky.) 240; *People v. Superior Court*, 34 Ill. 356; *Tapley v. Martin*, 116 Mass. 275 (1874).

¹⁰⁰ *Johnson v. Monell*, 1 Woolw. 390; *McGinnity v. White*, 3 Dillon, 350.

in his petition for removal that the plaintiff, when the suit in the State court was commenced, was and still is a citizen of the state in which the suit is brought, etc.; etc.

Where it is sought to remove a suit on the ground that it is one "arising under the Constitution, or laws or treaties of the United States," (Act of March 3, 1875, Sec. 2), it should appear from the pleadings or the petition for the removal, or both, that the case is one of this character.¹⁰¹ If this does not appear from the pleadings, that is, from the averments of facts therein or the nature of the case made thereby, then it must be made to appear by the petition for the removal; and the Circuit Judge for the Ninth Circuit, in a recent opinion where the point is carefully examined, has reached the conclusion, and enforced it by very persuasive arguments arising from the delay, inconvenience and abuse which would follow from a different practice, that the petition for the removal must state the *facts* (unless they appear in the pleadings) which show the case to be one of Federal cognizance, and that it is not sufficient to state generally that the case is one arising under the Constitution or Laws of the United States.¹⁰²

¹⁰¹ Construction of this clause in act of 1875. See *ante*, sec. 8.

¹⁰² *Trafton v. Nougues*, 13 Pacific Law Rep., 49; s. c., 4 Cent. L. J. 228. After stating the delay and obstruction to the administration of justice, which would result from allowing the petitioner for the removal to effect it on his mere statement that the case was one arising under the Constitution or Laws of the United States,—the duty of the Federal court to remand the cause at any stage when its non-federal character appears—the territorial extent of the Federal jurisdiction—the increased cost of litigation in the Federal courts—the abuse of the right by unscrupulous persons, to obtain delay or to harass their adversary,—Mr. Circuit Judge Sawyer concludes his opinion, in the case just cited, as follows: "In view of these, in my judgment, weighty considerations, therefore, I think it of the highest importance to the rights of honest litigants, and to the due and speedy administration of justice, that a petition for transfer should state the *exact facts*, and distinctly point out what the question is, and how and where it will arise, which gives jurisdiction to the court, so that the court can determine for itself from the facts, whether the suit does really and substantially involve a dispute or controversy within its jurisdiction. Whenever, therefore, the record fails to distinctly show such facts in a case transferred to this court, it will be

Surety—Bond.—Under section 639 of the Revised Statutes, good and sufficient surety is to be offered in the State court, at the time of filing the petition for the removal, for the petitioner's "entering in the Circuit court on the first day of its next session copies of the process," etc. This is substantially the requirement in this regard of the act of March 3, 1875, (sec. 3), except that the surety is to be given by a "bond" which is conditioned, not only for the entering of a copy of the record of the State court in the suit, but for "paying all costs that may be awarded by said Circuit court, if said court shall hold that such suit was wrongfully or improperly removed thereto." But if the Circuit court should hold that the suit was removable, it would not, probably, dismiss or remand it, because the bond did not contain this condition as to costs, or was otherwise informal.¹⁰⁸ This section has

returned to the State court, and under the authority given by section 5, at the cost of the party transferring it. If I am wrong in my construction of the act and the recent decisions of the Supreme court, the statute, section 5, happily affords a speedy remedy by writ of error, upon which this decision and the order remanding the case may be reviewed without waiting for a trial, and the question may as well be set at rest in this case as in any other. It is of the utmost importance that a final decision of the question be had as soon as possible. If counsel so desire, I will order the clerk to delay returning the case till they have an opportunity to sue out and perfect a writ of error."

¹⁰⁸Section 5 of the act of March 3, 1875. The defendants, under the act of 1789, must give several, or joint and several bonds, and not joint bonds,—so held by Potter, J., in *Hazard v. Durant*, 9 R. I. 602; but *quære?*

A case was remanded by Gresham, J., because the bond did not comply with the act of 1867, the penal sum being left blank, and because it did not contain the conditions required by the act of 1875. *Burdeck v. Hale*, 8 Ch. L. N., 192 (1876).

Where the party seeking a removal presents a bond apparently ample, the *State court* (assuming that that court may insist upon "a good and sufficient bond") can not arbitrarily refuse to receive the bond, and refuse to remove the case without giving the party an opportunity to correct the bond or make it ample. In an action where the claim was less than \$600, and where a bond for \$2000, in due form, with two sureties who justified in the sum of \$4000 each, was presented, which [the court refused to accept, without stating any reasons, the appellate court reversed the judgment, and held that it could not assume, under the cir-

been construed by the learned Circuit Judge of the 7th Circuit, who holds that "it did not intend that the suit should be dismissed or remanded on account of irregularities, provided it satisfactorily appears that the Circuit court has jurisdiction of the case."¹⁰⁴ But if the removal was not applied for in time, this is not treated as an unimportant irregularity, and the uniform practice is to remand the case. This objection must, however, be made seasonably, or it will be deemed waived.¹⁰⁵

SECTION XV.

EFFECT OF PETITION AND BOND FOR REMOVAL ON THE JURISDICTION OF THE STATE COURT.

The removal acts provide that, upon the filing of the proper petition and the offer of good and sufficient surety or bond, "it shall be the duty of the State court to accept the surety," [under act of March 3, 1875, "to accept said petition and bond"] "and to proceed no further in the suit," [under the act of 1866 "no farther in the cause"] "against the petitioner for removal."¹⁰⁶ If the case be within the act of Congress, and the petition is in due form, accompanied with the offer of the required surety or bond, the statute is that the State court *must* accept the surety or the

cumstances, that the lower court refused the bond, because not satisfied with the sureties. *Taylor v. Shaw*, 54 N. Y. (Ct. of Appeals), 75 (1873.)

¹⁰⁴ *Osgood v. Chicago, etc., R. R. Co.*, 7 Ch. Legal News, 241; s. c. 2 Cent. L. J. 275, and, on re-argument, 2 Cent. L. J. 283. See, also, *Parker v. Overman*, 18 How. 137, 141; *Infra*, sec. 15.

¹⁰⁵ *French v. Hay*, 22 Wall. 244; *Supra*, sec. 13.

¹⁰⁶ Rev. Stats., sec. 639. It is doubtful whether parties can remove a cause by a stipulation of the jurisdictional facts. At all events the practice should not be encouraged; and where a minor was a party, it was held he was incapable of consenting to the removal, and the cause was remanded. *Kingsbury v. Kingsbury*, 3 Bissell, 60 (1871), *Davis, Drummond and Blodgett, JJ.*, concurring.

petition and bond, and proceed no further in the case. Under such circumstances the State court has no power to refuse the removal, and can do nothing to affect the right, and its *rightful* jurisdiction ceases *eo instanti*; no order for the removal is necessary, and every subsequent exercise of jurisdiction by the State court, including its judgment, if one is rendered, is erroneous.¹⁰⁷ And if the right of removal

¹⁰⁷ *Fisk v. Union Pacific Railroad Co.*, 6 Blatchf. 362; s. c., *ib.* 243, 299; *Hatch v. Chicago, Rock Island & Pacific Railroad Co.*, 6 *ib.* 105; *Matthews v. Lyall*, 6 McLean, 13. The petition or application "for removal is *ex parte*, and depends upon the papers on which it is founded, and if they are regular and conform to the requirements of the statute, the [State] court has no discretion"—and the adverse party is not entitled to notice of the time and place of presenting the petition. *Fisk v. Union Pacific Railroad Co.* (Nelson, J.), 8 Blatchf. 243, 247 (1871).

"In cases where the proceedings are in conformity with the act, the removal is imperative, both upon the State and Circuit court; and if the facts [upon which the removal is based] are seriously contested, it must be done in a formal manner, by pleadings and proofs, in the latter court. The question of jurisdiction [in such a case] belongs to the Federal court, and must be heard and determined there." Nelson, J., in *Dennistoun v. Draper*, 5 Blatchf. 336, 338 (1866).

No order of removal necessary. *Hatch v. C., R. I. & P. R. R. Co.*, 6 Blatchf. 105 (1868).

Petition for removal was founded on the act of 1867. It did not show a right under this act, but did state a case within the act of 1866, and it was held sufficient to require a removal so far as authorized by the last-named act. *Dart v. Walker*, 4 Daly (N. Y.), 188 (1871).

"Where a suit is legally removed," says Gray, C. J., "into the Circuit court of the United States, the jurisdiction of the State courts over it ceases, and the suit is thenceforth to proceed to trial, judgment and execution in the Federal courts, and can not be remanded to the State courts for any purpose. *Kanouse v. Martin*, 15 How. 198; *Ins. Co. v. Dunn*, 19 Wall. 214; *Mahone v. Manchester etc. R. R. Co.*, 111 Mass. 72. Such removal of a case from the State to the Federal courts for trial does not change the nature of the issue to be tried or the judgment to be rendered. *West v. Aurora*, 6 Wall. 139; *Partridge v. Ins. Co.*, 15 Wall. 573." *Du Vivier v. Hopkins*, 116 Mass. 125, 128.

In the text we use the phrase "the *rightful* jurisdiction ceases *eo instanti*," and a subsequent judgment of the State court "is erroneous,"—we do not say null and void. Such a judgment is perhaps valid, unless reversed or set aside; but in many of the cases every subsequent exercise of jurisdiction is said to be null and void, and every step *coram non iudice*. How far the subsequent proceedings in the State court have any validity, if a proper application for removal be refused, see *Herryford v. Ætna*

has once become perfect, it can not be taken away by subsequent amendment in the State court or Federal court, or by a release of part of the debt or damages claimed, or otherwise.¹⁰⁸

Ins. Co., 42 Mo. 151, 153, where it is said "they are *coram non judice*;" S. P. Akerly v. Vilas, 1 Abb. U. S. 284; s. c., 2 Bissell, 110; Fisk v. Union Pacific R. R. Co., 6 Blatchf. 362; s. c., 8 *ib.* 243, 299; Stevens v. Phoenix Ins. Co., 41 N. Y. 149; and compare with Kanouse v. Martin, 15 How. 198; Gordon v. Longest, 16 Pet. 97; Ins. Co. v. Dunn, 19 Wall. 214; French v. Hay, 22 Wall. 250; Amory v. Amory, 36 N. Y. Superior Ct. R. 520; Bell v. Dix, 49 N. Y. 232; Stanley v. Ch., R. I. & P. R. R. Co. (Sup. Ct. of Mo.), 3 Cent. L. J. 430 (1876); Hadley v. Dunlap, 10 Ohio St. 1, 8, where the matter is discussed by Scott, J.; DuVivier v. Hopkins, 116 Mass. 125, 126.

The doctrine of the text to the effect that, if the petition for the removal presents a case within the removal acts, and is made in due time and accompanied with the proper surety, no order for the removal is necessary, is very strongly combated by Chancellor Cooper in the SOUTHERN LAW REVIEW for April, 1877. This learned writer contends that under such circumstances the jurisdiction of the State court continues, "until it has finally parted with it by the necessary order," and per consequence, that the Circuit court can in no case acquire jurisdiction, unless the State court has ordered the removal. No authority is cited for this position, except the case of the Railway Co. v. Ramsey, 22 Wall. 328, which it is a mistake to suppose *decided* any such proposition; and the Chief Justice, in the language referred to, probably had no such thought in his mind. The doctrine that an order of removal in such a case is not necessary to the jurisdiction of the Circuit court is universally accepted in those courts, and is constantly acted on. The acts of Congress speak of no order of removal being necessary; some of the acts distinctly provide for the cases proceeding in the Federal court, notwithstanding the State court or clerk may refuse to send or furnish copies of the record; and the act of 1875 (sec. 7) provides for a writ of *certiorari* to enforce not only the removal of a cause which the State court has ordered to be removed, but of any cause "removable under the act," where the parties entitled to a removal "have complied with the provisions of this act for the removal of the same." It would contravene the plain purpose of this provision to hold that a *certiorari* could rightfully issue only in cases where the State court had ordered the removal, or that it would be an answer to the writ for the State court to return that it had refused to order the removal.

¹⁰⁸ Kanouse v. Martin (amendment), 15 How. 198; s. c., 1 Blatchf. 149; Ladd v. Tudor, 3 Woodb. & Minot, 325; Muns v. Dupont, 2 Wash. C. C. 463; Akerly v. Vilas, 1 Abb. U. S. 284; s. c., 2 Bissell, 110; Hatch v. Rock Island etc. R. R. Co., 6 Blatchf. 105; Fisk v. Union Pacific R. R. Co., 6 *ib.* 362; s. c., 8 *ib.* 243; Roberts v. Nelson (amount), 8 *ib.* 74;

If the petition in connection with the pleadings does not show that the case is removable, the jurisdiction of the State court is not ousted, and its subsequent proceedings, if it refused to order the removal, would not, it is supposed, be void or erroneous.¹⁰⁹

And the same principle would apply, probably, if *no* security or bond whatever was offered and no removal ordered, since in that event the prescribed conditions for the removal have not been complied with; but it is doubtful, especially under the act of 1875, whether it belongs to the State court to judge of the sufficiency of the surety offered, and to refuse a removal because the surety or bond is not sufficient, and exercise jurisdiction subsequently on that ground alone.¹¹⁰

In the case of *Osgood v. Chicago etc. R. R. Co.*,¹¹¹ the petition and bond for the removal of the cause were filed in the vacation of the State court with the clerk, and it was *Gordon v. Longest*, 16 Pet. 97; *Matthews v. Lyall* (as to right to dismiss), 6 McLean, 13; *Wright v. Wells*, Pet. C. C. 220; *Stanley v. C.*, R. I. & P. R. R. Co., 3 Cent. L. J. 430.

¹⁰⁹ *Gordon v. Longest*, 16 Pet. 97; *Ins. Co. v. Dunn*, 19 Wall. 214; *Kanouse v. Martin*, 14 How. 23; s. c., 15 How. 198; *Stevens v. Phoenix Ins. Co.*, 41 N. Y. 149; *Holden v. Putnam Fire Ins. Co.*, 46 N. Y. 1; *Savings Bank v. Benton*, 2 Metc. (Ky.) 240.

¹¹⁰ See *nisi prius* opinion of Morton, J., in *Bank v. King Wrought Iron Bridge Co.*, 2 Cent. L. J. 505, denying *Osgood v. Chicago etc. R. R. Co.*, *infra*; s. c. in Circuit court U. S., 2 Cent. L. J. 616. See *Id.*, 679, 730. The ruling of Drummond, J., in *Osgood's* case, approved *Jones v. Amazon Ins. Co.*, 9 Ch. Legal News, 68, dissented from in *Mayo v. Taylor*, 8 Ch. Legal News, 11. See also *dictum* of the Chief Justice in *Railway Co. v. Ramsey*, 22 Wall. 328, that "if upon the hearing of the petition it is sustained by proof, the State court can proceed no further"—but *quære*, whether the State court can hear and determine whether the proofs sustain the petition.

Mr. Chancellor Cooper, in the *SOUTHERN LAW REVIEW* for April 1877, combats the doctrine of Judge Drummond in the *Osgood Case* and the other cases that follow it, namely, that the State court has no right to pass upon the sufficiency of the bond. The point is by no means clear, and there is reason (looking at the object of the bond and the language of the act of Congress) for the opinion, that it was contemplated that the State court might reject a bond distinctly on the ground that it was not sufficient; but its action in this regard can not be admitted to be conclusive, in all cases, on the Federal courts.

¹¹¹ 2 Cent. L. J. 275; s. c., 7 Ch. Legal News, 241.

held that this, without any action of the court as to the sufficiency of the petition or bond, *ipso facto*, deprived the State court of jurisdiction—the sufficiency of these (under the act of 1875) being for the Circuit court. Judge Drummond says : “ It is true that under the statute the bond must be good and sufficient security ; but it does not declare that it shall be approved by the judge. It requires the State court to accept the petition and bond, and proceed no further in the case.¹¹² The fifth section of the act of March 3, 1875, tends to confirm the view that the State court is not authorized to make a judicial inquiry into and decision on the sufficiency of the *bond*. Its determination, however, that a *sufficient petition* is not sufficient, can not deprive the Federal court of jurisdiction. So its determination that an *insufficient petition* is sufficient, while it is not immaterial, especially if accompanied with an order for removal, will not conclude that question, and it will be the duty of the Federal court, on motion, to remand the cause.¹¹³

SECTION XVI.

EFFECT ON THE JURISDICTION OF THE FEDERAL COURT.

“ Upon the copy of the record of the suit being entered as aforesaid in the Circuit court of the United States,” the provision is, “ that the cause shall then proceed in the same manner as if it had been originally commenced in the said Circuit court.” “ And the copies of the pleadings shall have the same force and effect, in every respect and for every purpose, as the *original pleadings* would have had by the laws and practice of the courts of the State, if the cause had remained in the State court.”¹¹⁴

¹¹² See 2 Cent. L. J. 616.

¹¹³ *Urtetiqui v. D'Arcy*, 9 Pet. 692.

¹¹⁴ Rev. Stats., sec. 639. And see act March 3, 1875, secs. 3, 6.

No *new pleadings* are in general necessary in the cause after its removal to the Federal court,¹¹⁵ though it may often be advisable, especially in equity cases, to file new pleadings. We have before referred to this subject.¹¹⁶ The *practice* after removal is to be the same, as if the cause had been originally brought in the Federal court, including the power to allow amendments.¹¹⁷ *Amendments* in respect to jurisdictional facts have sometimes been allowed.¹¹⁸

The jurisdiction of the Circuit court does not, probably, attach until the record of the State court is entered therein. If it be entered *before* the time, it has been made a question whether it will *then* attach. For some purposes it would seem that it might; as, for example, if it became necessary meanwhile to issue an injunction or appoint a receiver (which should be done, however, only upon notice), in order to protect the rights of the parties or to preserve the property in litigation.

By express provision of *existing statutes*, *attachments* of property hold, *bonds* of indemnity remain valid, and writs of *injunction* continue in force notwithstanding the re-

¹¹⁵ *Dart v. McKinney* (act of 1866), 9 Blatchf. 359 (1872), Blatchford, J. *Supra*, sec. 9 and cases cited. In removals under the Judiciary Act, the defendant is not in default for not pleading in the State court, and he may plead in the Circuit court. *Webster v. Crothers*, 1 Dillon C. C. 301 (1870).

¹¹⁶ *Supra*, sec. 9 and cases there cited.

¹¹⁷ *Suydam v. Ewing*, 2 Blatchf. 359 (1852), Betts, J.; *Akerly v. Vilas*, 5 Ch. Legal News, 73; *supra*, sec. 9 and cases cited.

¹¹⁸ In the original petition the plaintiff, by mistake of his attorney, described himself as a citizen of the state where the suit was brought; he obtained a removal of the case on the ground that he was a citizen of another state, and in the Federal court he was permitted by Mr. Justice Bradley to amend his petition and state his true citizenship, both then, and when the suit was commenced, and to make new parties defendant with respect to matters properly pertaining to the original cause of action. *Barclay v. Levee Commissioners*, 1 Woods C. C. 254. In *Hodgson v. Bowerbank*, 5 Cranch, 303, the court having decided that the objection to the jurisdiction (the defendant being described in the record as "late of the District of Maryland," instead of a *citizen* of Maryland) was fatal, the "record was afterwards amended by consent." *Parker v. Overman*, 18 How. 137, cited *infra*, sec. 17, note.

removal, until dissolved or modified by the Circuit court.¹¹⁹ This provision was, doubtless, enacted to obviate a different judicial construction which has been placed upon previous removal acts.¹²⁰

SECTION XVII.

REMANDING OF CAUSE TO THE STATE COURT.

If the petition for the removal and the copy of the pleadings or record in the State court, taken together, do not show that the case was removable under the legislation of Congress; or if they show that the removal was not applied for in time; or that any other substantial condition of the right of removal, such as value, has not been met or complied with, but the removal has, nevertheless, been ordered, the other party may move to remand the cause to the State court, and it ought to be remanded accordingly. This was

¹¹⁹ Rev. Stats., sec. 646; Act March 3, 1875, sec. 4.

¹²⁰ See *New England Screw Co. v. Bliven*, 3 Blatchf. 240, but *quære?* *Barney v. Globe Bank* (attachment holds the property after removal under the Judiciary Act, sec. 12), 5 Blatchf. 107 (1862).

Attachment—Motion to Dissolve.—A motion to dissolve an attachment when authorized by the local laws, may be made in the Circuit court after the removal; and in the discretion of the court it may be renewed, although it was once argued and denied in the State court. *Garden City Manuf. Co. v. Smith*, 1 Dillon C. C. 305 (1870). As to custody and disposition of property attached, *Dennistoun v. Draper*, 5 Blatchf. 336.

Injunction—Motion to Dissolve.—Under the act of July 13, 1866 (14 Stats. at Large, 171, sec. 67), Drummond, Circuit Judge, following the decision of McLean, J., in *McLeod v. Duncan*, 5 McLean, 342, held that an injunction issued by the State court was *ipso facto* dissolved by the removal of the cause into the Federal court—that act making provision that “all attachments made, and all bail and security given upon such suit or prosecution, shall continue in force,” and saying nothing as to injunctions. See *Hatch v. Chicago, R. I. & P. R. R. Co.*, 6 Blatchf. 105, holding same doctrine as to cases removed under sec. 12 of the Judiciary Act. But these decisions are no longer applicable, where there is an express statute provision, that injunctions granted by the State court continue in force after the removal of the cause, until dissolved or modified.

the uniform practice before the act of 1875 ; but under the 5th section of that act, while it is clear that a cause ought to be remanded which is not removable, or in which the right to a removal has been waived because not applied for in time, and the like, it is doubtful whether, if the record was in fact filed in the Federal court in time, defects connected with the giving of the surety or bond, or other irregularities which have not worked any prejudice, will be ground for dismissing or remanding the case.¹²¹

The section last referred to makes it the duty of the Circuit court to dismiss or remand the case whenever it appears, to its satisfaction, that the " suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of the Circuit court." In our judgment this is the test of Federal jurisdiction, and the one which ought to be applied to the complex and diversified cases which will arise under the act of 1875, namely, if the *real and substantial* controversy is one between citizens of different states, although incidentally and collaterally there may be a controversy between some parties who may be citizens of the same state ; or if the case is one which arises under the Constitution or Laws of the United States, although not wholly depending thereon as before explained, the case is one of Federal cognizance and should be retained ; otherwise, dismissed or remanded.

A party entitled to a removal may estop himself to apply

by the Federal court. Where an injunction has been allowed by the State court upon a full hearing, and the cause is afterwards removed,—while the Federal court may, under the act of 1866, dissolve the injunction, yet, where the *motion to dissolve is upon the same papers* on which the writ was granted (this being in effect an application for re-argument of the motion made in the State court), leave to make such motion should first be applied for and obtained, before it can be made. *Carrington v. Florida R. R. Co.*, 9 Blatch. 468 (1872), *Benedict, J.*

¹²¹ See *supra*, sec. 9, as to *time* of applying for removal. When the case is one of Federal cognizance, the right to have the cause remanded, because of defects in mode of removal, etc., may be waived. But there is no waiver of the right, where the case is not really and substantially one of Federal jurisdiction. *Price v. Sommers*, 8 Ch. Legal News, 290.

for it,¹²² or, having applied, may waive the right to a removal by his subsequent conduct in the State court;¹²³ but contesting the case in the State court, after it has erroneously refused to grant the application for a removal, is no waiver of the party's right.¹²⁴

Under sec. 639 of the Revised Statutes, and under the act of 1875, the defendant must give surety for his *entering copies of the record* on "the first day of the next session" of the Federal court—the latter act providing further (sec. 7), that if the next term shall commence within twenty days after the application for removal, the party shall have twenty days, from the time of the application, to file in the Federal court the copy of the record and enter his appearance therein. If this condition of the undertaking and bond is not complied with, the obligors would doubtless be liable on the bond; and there may be such unexcused laches in the filing of the copy of the record of the State court, as where without necessity or good reason a term lapses, or the other party is prejudiced by the delay, that the Federal court will for this reason remand the case, even though it be one of Federal cognizance. Such is the practice of the Federal courts, so far as we are acquainted with it.¹²⁵

¹²² Executing bond to procure discharge from a writ of *ne exeat*, held to *estop*, by its condition "to abide the decree of the State court"—the defendant who executed it, to remove the cause to the Federal court. *Hazard v. Durant et al.* (Potter, J.), 9 Rhode Island, 602, 606 (1868).

¹²³ A petition and bond for removal were filed in the State court;—no motion was made or entered, nor the attention of the court called to the fact, and the parties nearly a year afterwards went to trial on the merits. On appeal the court held, that *the right to a removal could be waived*, and under the circumstances must be considered waived; though it was admitted that it would have been otherwise, if the court had been cognizant of the petition, and that the party insisted on it, and had nevertheless ordered the trial to proceed. *Home Ins. Co. v. Curtis* (Sup. Ct. Mich.), 3 Cent. L. J. 27 (1875).

¹²⁴ *Insurance Co. v. Dunn*, 19 Wall. 214; *Gordon v. Longest*, 16 Pet. 98; *Kanouse v. Martin*, 15 How. 198; *Stevens v. Phoenix Ins. Co.*, 41 N. Y. 149; *Hadley v. Dunlap*, 10 Ohio St. 1.

¹²⁵ *Supra*, sec. 14. *Time of filing copies of papers.* Where the petition for

The *motion to remand must be based* upon the petition for removal and the record as it is sent up from the State court. If the petition, in connection with the record, is sufficient on its face, but states as ground of removal facts which are not true, as for example, in regard to citizenship, or value, where the value does not appear in the pleadings, issue may be taken thereon in the Circuit court by a plea in the nature of a plea in abatement;¹²⁶ but such an inquiry can not be gone into in the State court.¹²⁷

Where the State court has ordered the removal improv-

removal was filed in February, 1874, and the next term of the Federal court was in April, 1874, and copies of the proper papers were not filed until August, 1875, the delay was such that the Federal court remanded the case, and held that the delay was not excused by the action of the State court in denying the petition, and the petitioner's action in the meantime in securing, by appeal to the state appellate tribunal, a reversal of the order denying the removal. *Clippinger v. Mo. Valley Life Ins. Co.* (North. Dist. Ohio), 8 *Chicago Legal News*, 115 (1875); but *quære*, whether under the circumstances the delay was not sufficiently excused.

¹²⁶ *Coal Co. v. Blatchford*, 11 Wall. 172; *Heath v. Austin*, 12 *ib.* 320. "The motion to remand admits the facts set out in the petition for removal, and proceeds upon the ground that under the state of facts [presented in the record] the case was improperly removed, and this court is without jurisdiction over it." *Buttner v. Miller*, 1 Woods C. C. 620 (1871). When motion to remand is proper, and when not. *Heath v. Austin*, 12 Blatchf. 320; *Dennistoun v. Draper*, 5 *ib.* 336; *Galvin v. Boutwell*, 9 *ib.* 470.

If the case is *not one of Federal cognizance*, it must be dismissed or remanded at any stage when the fact appears or is duly established. *Dennistoun v. Draper*, 5 Blatchf. 336 (1856), *Nelson, J.*; *Pollard v. Dwight*, 4 Cranch, 421; *Wood v. Matthews*, 2 Blatchf. 370.

The act of March 3, 1875, section 5, provides that, if "at any time" after the removal the non-federal character of the case shall appear, "the Circuit court *shall* proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require."

¹²⁷ *Fisk v. Union Pacific R. R.*, 8 Blatchf. 243 (1871), *Nelson, J.*; *Stewart v. Mordecai*, 40 Ga. 1. It is settled law that the facts stated as the ground of the removal can not be contested or inquired into in the State court. That inquiry belongs exclusively to the Federal court.

In *Knickerbocker Life Ins. Co. v. Gorbach*, 70 Pa. St. 150 (1871), both parties seemed to concede the right of the State court to determine whether the facts stated in the petition for removal were true, and that question was tried and decided against the party applying for the re-

erly, the Circuit court should remand the suit.¹²⁸ If the State court has remitted the case, though erroneously, its jurisdiction is at an end until it is restored by the action of the Federal courts.¹²⁹ If the Circuit court erroneously refuses to remand such a case, the proper remedy of the party is not by proceeding in the State court at the same time the cause is in the Circuit court, but is alone in the Federal court; the action of the Circuit court in remanding, or refusing to remand, a cause being reviewable on error or appeal by the Supreme Court.¹³⁰

moval, and the decision reversed by the Supreme Court of the State; but this practice is in direct conflict with the acts of Congress in this behalf.

Burden of proof as to jurisdictional facts, where contest is made in the Federal court after the removal. *Heath v. Austin*, 12 Blatchf. 320.

¹²⁸ Act March 3, 1875, sec. 5, referred to *supra*. Although the State court has ordered the removal, yet if such order was improperly made, the Circuit court should remand the cause, as it must determine for itself the question of jurisdiction. *Field v. Lownsdale*, 1 Deady, 288, Deady, J. Where the Federal court orders a cause remanded to the State court, the Supreme Court of the State will not issue a writ of *mandamus* or other process to restrain the State court from proceeding with the cause, until the party who attempted to transfer the cause to the Federal court can invoke the revisory power of the Supreme Court of the United States to compel such transfer. *Ex parte State Ins. Co. of Ala.*, 50 Ala. 464 (1874).

¹²⁹ On the order of the Circuit court remanding a cause which the State court had previously ordered to be transferred, the jurisdiction of the latter court re-attaches, and it may proceed therewith. *Thacher v. McWilliams*, 47 Ga. 306 (1872). But under the act of March 3, 1875 (sec. 5), such an order of the Circuit court is reviewable by the Supreme Court of the United States on appeal or writ of error; and if the order be superseded, a question may arise as to the power of the State court pending the appeal or writ of error, to proceed with the cause under or in consequence of the order remanding it.

¹³⁰ *Ins. Co. v. Dunn*, 19 Wall. 214, 223; *Gordon v. Longest*, 16 Pet. 97; Act March 3, 1875, sec. 5; *Green v. Custard*, 23 How. 484; *Fasnacht v. Frank* (effect of appeal), U. S. Sup. Court, Oct. Term, 1874, 23 Wall. 416. See 2 Cent. L. J. 290.

Where in a suit removed into the Circuit court the papers were afterwards destroyed by fire, and the parties stipulated in writing that the cause was transferred *in accordance with the statute in such case provided*, the Supreme Court will presume, in the absence of proof to the contrary, that the citizenship requisite to give jurisdiction was shown in some proper manner, though it did not appear on the face of the pleadings. R. R.

Where the State court asserts jurisdiction after a proper application for removal, the question of jurisdiction is not waived by the party entitled to the removal, by reason of his appearing and contesting in the State court the claim or matter in dispute.¹²¹ If in such case the judgment of the State court be against him on the trial or hearing, he may appeal to the highest court of the state; and if the decision below is there affirmed, he may sue out a writ of error from the Supreme Court of the United States; and if the record shows that the removal of the suit was improperly denied, that court will not examine into the merits of the case or generally into the record, but will reverse the judgment of the highest court of the state, with directions to reverse the judgment of the lower State court and to order a transfer of the cause from that court to the Circuit court of the United States, pursuant to the petition for the removal originally filed in such State court.¹²² The Circuit court has the power

Co. v. Ramsey, 22 Wall. 322. In a petition for removal it was stated that the parties "resided" in such and such states. The Supreme Court said: "'Citizenship' and 'residence' are not synonymous terms; but as the record [in the Circuit court] was afterwards so amended as to show conclusively the citizenship of the parties, the court below had, and this court have, undoubted jurisdiction of the case." *Parker v. Overman*, 18 How. 137, 141. Amendments, see *supra*, sec. 16 and cases cited.

An averment, that the party defendant is a citizen of the Southern District of Alabama, is a sufficient averment that he is a citizen of Alabama. *Berlin v. Jones*, 1 Woods C. C. 638.

¹²¹ *Ins. Co. v. Dunn*, 19 Wall. 214; *Gordon v. Longest*, 16 Pet. 98; *Kanouse v. Martin*, 15 How. 198; *Stevens v. Phoenix Ins. Co.*, 41 N. Y. 149; *Hadley v. Dunlap*, 10 Ohio St. 1; *Stanley v. C., R. I. & P. R. R. Co.*, 3 Cent. L. J. 430.

¹²² *Gaines v. Fuentes*, Sup. Court U. S. Oct. Term, 1875, 2 Otto, 10; s. c., 3 Cent. L. J. 371, and see cases last cited. In the *Atlas Ins. Co. v. Byrus*, 45 Ind. 133 (1873), the State court of original jurisdiction improperly refused to transfer the cause to the Federal court, and rendered judgment against the party entitled to the removal;—on appeal, the Supreme Court of the State reversed the judgment and remanded the cause to the court below, with directions to sustain the application to remove the cause to the Circuit court of the United States.

The State courts have generally held, that *an appeal lies to the appellate court of the state* from an order for the removal of a cause to a Federal court, or from an order referring such removal. *State v. The*

to protect its suitors by injunction against a judgment in the

Judge, 23 La. An. 29 (1871); Bryant v. Rich, 106 Mass. 180; Crane v. Reeder, 28 Mich. 527 (1874); Whiton v. Chicago & N. W. R. R. Co., 25 Wis. 424; s. c., 13 Wall. 270; Darst v. Bates, 51 Ill. 439. See opinion of Gray, C. J., in Mahone v. Manchester etc. R. R. Co., 111 Mass. 74; Hough v. West. Transp. Co., 1 Bissell, 425. But the courts in New York have decided otherwise. Stevens v. Phoenix Ins. Co., 41 N. Y. 149; Bell v. Dix, 49 N. Y. 232. See on this subject Ellerman v. New Orleans etc. R. R. Co., 2 Woods C. C. 120 (1875) (Woods, Circuit Judge); Ins. Co. v. Dunn, 19 Wall 214; Ins. Co. v. Morse, 20 Wall. 445, and cases cited *infra*.

But whatever may be the true view on this point, it is plain that, if the case is removable, and the application is in due form and in time, the act of Congress gives "an unqualified and unrestrained right to a removal," and declares that the State court shall "proceed no further in the suit;" and in such a case the State court, it seems plain, can not, after such application, allow an appeal to the appellate court of the state, and accept a *supersedeas* bond, which shall have the effect to prevent a removal to the Federal court pending such appeal. See Akerly v. Vilas, 1 Abb. U. S. Rep. 284. This is undoubtedly the law under the act of 1875, which authorizes the Federal court to issue a *certiorari* to the State court, to which it would not be sufficient for the State court to return that an appeal had been taken to the appellate court of the state. Ellerman v. New Orleans R. R. Co., (Woods, Circuit Judge), 2 Woods C. C. 120 (1875); Insurance Co. v. Morse, 20 Wall. 445.

If a removal has been applied for and denied, and the party persists in proceeding in the State court, Allen. J., in Bell v. Dix, 49 N. Y. 232 (1872), conceding that the question of jurisdiction must be decided by the Federal Circuit Court, said, *arguendo*, that the remedy of the party, who sought the removal which the State court denied, was to apply to the Circuit court of the United States for the proper mandate staying proceedings in the State court, and to compel a transcript of the record to be certified to the Federal court. If the other party claims that the cause has not, for any reason, been effectually removed, he should apply to the Federal court to remand the cause; but the majority of the court concurred in affirming the order of the special term denying the motion of the party who sought the removal, to stay in the State court further proceedings in the action. In Fisk v. Union Pacific R. R. Co., 6 Blatchf. 362, it was held that the Federal court would not, after the removal of the cause into it, stay proceedings in the State court, these being null and void. The ground of these determinations evidently is, that if the removal was properly applied for, it was useless to stay the proceedings in the State court, as it was deprived of jurisdiction—that is, of rightful jurisdiction; on the other hand, if the removal was not authorized, it would be improper to interfere with the jurisdiction of the State court. This conclusion largely rests upon the delicacy with which one court interferes with the proceedings of another, and leads to no little confusion, expense and embarrassment in its

State court rendered subsequent to a proper application to remove the cause.¹³³

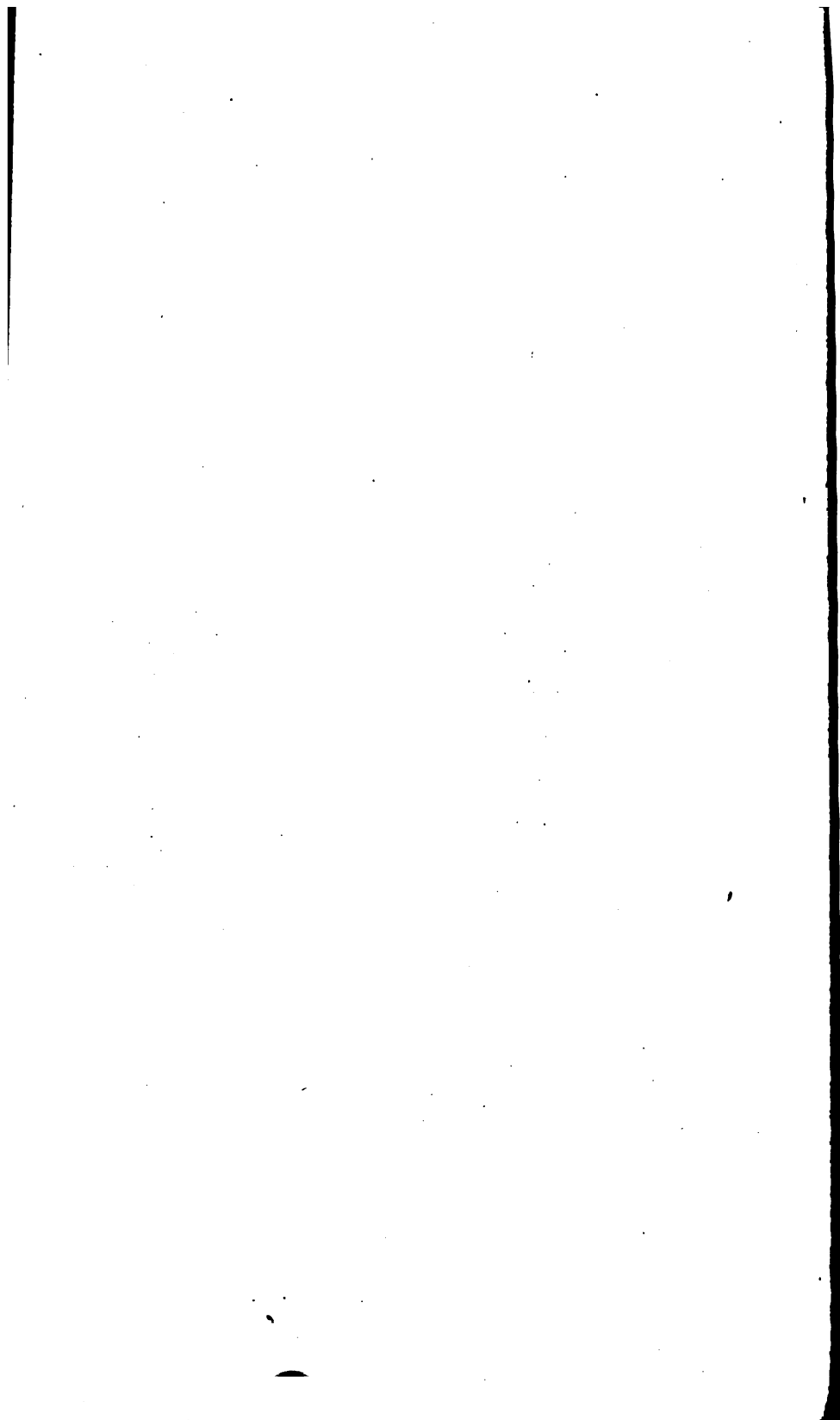
If a cause be improperly removed into the Circuit court, and it entertains jurisdiction in a case in which by law it can have none, its judgment will be reversed by the Supreme Court, with directions to the Circuit court to remand the same to the State court whence it was improperly taken.¹³⁴

practical effect. For example, recently, in a case in Iowa, a removal of a cause was sought in the State court. The State court denied it. A copy of the record in the cause was filed in the United States Circuit court for Iowa. That court held that the removal was effectual; the other party appeared, and, on the final hearing, a decree was rendered against him. The State court proceeded with the cause and, on final hearing, rendered a decree in favor of the other party. On appeal to the Supreme Court of the state, it affirmed the judgment below, so that there are two opposite final decrees, one in the State court, and the other in the Federal court—the result of the one court not interfering with the other. The case of *French v. Hay*, 22 Wall. 250, shows that the Federal court may protect a party by injunction against a judgment in the State court rendered therein after a proper application to remove the cause.

As to appeals from the decision of the *nisi prius* State court granting or refusing the petition for removal to the appellate court of the state, and the effect thereof, see, *Kanouse v. Martin*, 15 How. 198, s. c. 14 How. 23; s. c., 1 Blatchf. 149; *Burson v. Park Bank*, 40 Ind. 173; *Western Union Telegraph Co. v. Dickinson*, 40 Ind. 444; *Indianapolis etc. R. R. Co. v. Risley*, 50 Ind. 60; *Whiton v. R. R. Co.*, 25 Wis. 424; *Railroad Co. v. Whiton*, 13 Wall. 270; *Akerly v. Vilas*, 24 Wis. 165; s. c., 2 Bissell, 110; *Home Ins. Co. v. Dunn*, 20 Ohio St. 175; *Ins. Co. v. Dunn*, 19 Wall. 214; *Atlas Ins. Co. v. Byrus*, 45 Ind. 133; *Gordon v. Longest*, 16 Pet. 97; *Hadley v. Dunlap*, 10 Ohio St. 1; *Stevens v. Phoenix Ins. Co.*, 41 N. Y. 149; *Holden v. Putnam Ins. Co.*, 46 N. Y. 1; *People v. Sup. Court*, 34 Ill. 356; *Savings Bank v. Benton*, 2 Metc. (Ky.) 240; *Taylor v. Shaw*, 54 N. Y. 75 (1873); *Bell v. Dix* (interesting case), 49 N. Y. 232 (1872). In case of removal from State to United States court, when the proceedings for removal are regular, the jurisdiction of the State court is *ipso facto* ousted by virtue of such proceedings. The allegation as to jurisdiction can be proven on the trial, and the proper judgment asked for. *Shaft v. Phoenix Mut. Life Ins. Co.*, N. Y. Ct. of Appeals, not yet reported.

¹³³ *French v. Hay*, 22 Wall. 250.

¹³⁴ *Knapp v. Railroad Co.*, 20 Wall. 117.



APPENDIX.

FORMS OF PETITIONS FOR REMOVAL AND BONDS
UNDER THE REVISED STATUTES, SEC. 639, AND THE ACT
OF MARCH 3, 1875. FORM OF WRIT OF CERTIORARI
AUTHORIZED BY SEC. 7 OF THE LAST-NAMED STATUTE.

The following Forms, with slight alterations, are those in common use in the Eighth Judicial Circuit. By reference to the text it will be seen that they are in some respects unnecessarily full; but they are perhaps safer than others would be, which should be reduced to the exact requirements of the act in the particular case.

Form of PETITION for the transfer of a cause from the State to the Federal court under the act of March 2, 1867, as revised and embodied in the Revised Statutes of the United States, sec. 639, sub-division 3.

IN THE ——— COURT OF ——— COUNTY, STATE OF ———.

vs.

} Petition for Transfer of Suit to Federal Court.

To the Honorable, the ——— Court of ——— County, State of ——— :

Your petitioner [here insert the plaintiff's name], respectfully shows that he is plaintiff in the foregoing entitled suit, and that the same was by him commenced on or about the — day of —, 18 —, in said — Court; that your petitioner was at the time of bringing said suit, and still is, a citizen of the State of —, and a resident thereof.

Your petitioner further shows that there is, and was at the time said suit was brought, a controversy therein between your petitioner and the said defendant, ———, who is a citizen of the State of —, and resident

thereof; that said action was brought by your petitioner, for the purpose of [here briefly state the nature of the suit and the relief asked], and that the matter in dispute in this suit exceeds the sum of five hundred dollars, exclusive of costs. Your petitioner further represents, that this suit has not been tried, but is now pending for trial in the District court of the State of —, for said County of —, and that your petitioner desires to remove the same into the Circuit court of the United States for the District of —, in pursuance of the act of Congress in that behalf provided, to wit, the Revised Statutes of the United States, section 639, sub-division 3.

Your petitioner further says, that he has filed the affidavit required by the statute in such cases, and offers herewith his bond executed by —, of —, as surety, in the penal sum of two hundred and fifty dollars, conditioned as by said act of Congress required.

Your petitioner therefore prays, that the said bond may be accepted as good and sufficient, according to the said act of Congress, and that the said suit may be removed into the next Circuit court of the United States, in and for said District of —, pursuant to the aforesaid act of Congress, in such case made and provided; and that no further proceedings may be had therein in this court.

And your petitioner will ever pray, etc.,

Attorney for Plaintiff.

Form of AFFIDAVIT OF PREJUDICE or local influence to accompany the preceding petition.

IN THE — COURT OF — COUNTY, STATE OF —.

	Plaintiffs,	} Affidavit.
vs.	Defendants.	

State of —, County of —, ss.

I, —, being duly sworn, do say that I am one of the — in the above entitled cause; that I have reason to believe, and do believe, that from prejudice and local influence, — will not be able to obtain justice in said State Court.

Subscribed by the said — in my presence, and by him sworn to before me at —, this — day of —, A. D. 187 .

Notary Public in and for — County.

Who may make this affidavit. See *ante*, sec. 14. How to be taken and certified. See *ante*, sec. 14.

Form of BOND to accompany the Preceding Petition for Removal of a Cause, under the Act of March 2, 1867, as Revised and Embodied in the Revised Statutes of the United States.

KNOW ALL MEN BY THESE PRESENTS :

That we _____ as principal, and _____ of _____ as surety, are hereby held and firmly bound unto _____ in the penal sum of _____ Dollars, lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves jointly and severally firmly by these presents.

The condition of this obligation is such, that if _____ shall enter and file, or cause to be entered and filed, in the next Circuit of the United States, in and for the _____ District of _____, on the first day of its session, copies of all process, pleadings, depositions, testimony and other proceedings in a certain suit or action now pending in the District court of the County of _____ and State of _____, in which _____ is plaintiff, and _____ defendant; and shall do such other appropriate acts as, by the act of Congress in that behalf, are required to be done upon the removal of such suit from said State court into the said United States court, then this obligation to be void, otherwise of force.

Dated _____, A. D. 187 .

STATE OF _____, }
_____ County. } ss.

I, _____ of said County, the surety named in the foregoing bond, being duly sworn, do depose and say that I am a resident of the State of _____, and a property-holder therein; that I am worth the sum of five hundred dollars, over and above all my debts and liabilities, and exclusive of property by law exempt from execution; that I have property in the State of _____, liable to execution, of the value of more than five hundred dollars.

Subscribed in my presence by _____, and by him sworn to before me this _____ day of _____, A. D. 187 .

The above form of bond is applicable, also, to removals under section 633, sub-division 1, of the Revised Statutes, formerly section 12 of the Judiciary Act. If the removal is under sub-division 2 of said section 639, by the non-resident

defendant, the *condition* of the bond may be modified, as prescribed by this section, to enter and file in, etc., on, etc., "copies of all process, pleadings, depositions, testimony, and all other proceedings in the cause concerning or affecting the petitioner for the removal in a certain suit or action now pending," etc., as in the preceding form.

PETITION FOR REMOVAL BY THE NON-RESIDENT DEFENDANT UNDER THE REVISED STATUTES, SEC. 639, SUBDIVISION 2, FORMERLY THE ACT OF JULY 27, 1866.

Describe the parties, the State court in which the suit is pending, as in the preceding petition, stating particularly the citizenship of each of the plaintiffs and each of the defendants—the amount or value in dispute, as in the preceding form. Then insert in the petition for removal a statement that the said suit in the said State court is one in which there can be a final determination of the controversy, so far as concerns the petitioner, without the presence of the other defendants as parties in the cause. [No affidavit of prejudice or local influence is required.] Then offer surety as in preceding petition, and pray removal of the cause, so far as concerns the petitioner for the removal, as in the foregoing form.

Form of PETITION for Removal on the ground of CITIZENSHIP, under the Act of March 3, 1875, where the Adversary Parties are all Citizens of different States, and all the Plaintiffs or all the Defendants unite in the Petition for Removal.

IN THE ——— COURT OF ——— COUNTY, STATE OF ——— .

vs.	Plaintiff,	}	Petition for removal to the Circuit Court of the United States, District of ——— .
	Defendant.		

To Said ——— Court:

Your Petitioner respectfully shows to this Honorable Court that the

matter and amount in dispute in the above entitled suit exceeds, exclusive of costs, the sum or value of five hundred dollars.

That the controversy in said suit is between citizens of different States, and that the Petitioner was, at the time of the commencement of this suit, and still is, a citizen of the State of —, and that — was then, and still is, a citizen of the State of —, and that — was then, and still is, a citizen of the State of —. [Here give in like manner the citizenship of each of the several plaintiffs and defendants in the cause.]*

And your petitioner offers herewith a bond with good and sufficient surety for his entering in said Circuit Court of the United States, on the first day of its next session, a copy of the record in this suit, and for paying all costs that may be awarded by said Circuit Court, if said Court shall hold that this suit was wrongfully or improperly removed thereto.

And he prays this Honorable Court to proceed no further herein, except to make the order of removal required by law, and to accept the said surety and bond, and to cause the record herein to be removed into said Circuit Court of the United States in and for the District of —, and he will ever pray.

Attorneys for Petitioner.

The act of 1875 does not require the petition for the removal to be verified ; but, as affording an assurance that the application is made in good faith, a verification may very properly be added, which may be in the following form :

STATE OF —, }
 — County. } ss.

I, —, being duly sworn, do say that I am a member of the firm of —, the attorneys for the petitioner in the above entitled cause ; that I have read the foregoing petition, and know the contents thereof ; and that the statements and allegations therein contained are true, as I verily believe.

Subscribed by the said — in my presence, and by him sworn to before me, this the — day of —, A. D. 187 .

If, however, all the parties plaintiff or defendant do not join in the application for the removal, and the application is made under the latter clause of sec. 2 of the act of March 3, 1875, by part of the plaintiffs or part of the defendants actually interested in the controversy, follow the preceding

form down to the star (*), giving the citizenship of each of the plaintiffs and defendants, and then add the following:

Your Petitioner states that, in the said suit above mentioned, there is a controversy which is wholly between citizens of different States, and which can be fully determined as between them, to wit, a controversy between the said petitioner and the said _____, the said _____ and the said _____, [naming the parties actually interested in the said controversy].

If the nature of the controversy does not fully appear in the pleadings, it may be advisable to add a statement of the facts showing the case to be one within the latter clause of sec. 2 of the act of March 3, 1875. After which let the petition follow the form above given.

If the PETITION FOR REMOVAL is on the ground that the suit is one "*arising under the Constitution or Laws of the United States, or treaties made under their authority,*" it is not necessary to state the citizenship of the parties. It is, however, proper to do so; and if there are several parties, and the transaction in controversy is complex, it may be advisable to state the citizenship of each. The preceding form can, therefore, be followed down to the star (*), and then there may be added the following:

Your Petitioner states that the said suit is one arising under the laws of the United States, in this, to wit: [Here state the facts which show the Federal character of the case; see *ante*, secs. 2 and 8.]

After which let the petition continue as in the form above given.

Form of BOND for the removal of a cause under the act of March 3, 1875.

KNOW ALL MEN BY THESE PRESENTS:

That I, _____, as principal, and _____, as sureties, are held and firmly bound unto _____ in the penal sum of _____ dollars, the payment whereof well and truly to be made unto the said _____, heirs and assigns, we bind ourselves, our heirs, representatives and assigns, jointly and severally, firmly by these presents.

Yet, upon these conditions: The said _____ having petitioned the

— Court of — County, State of —, for the removal of a certain cause therein pending, wherein — plaintiff, and — defendant, to the Circuit court of the United States in and for the District of —.

Now, if the said —, your petitioner, shall enter in the said Circuit court of the United States, on the first day of its next session, a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said Circuit court of the United States, if said court shall hold that said suit was wrongfully or improperly removed thereto [*if special bail was originally requisite in said cause, then add "and shall then and there appear and enter special bail in said suit"*] then this obligation to be void; otherwise, in full force and virtue.

Witness our hands and seals, this — day of —, A. D. 187.

_____ [L. S.]

_____ [L. S.]

_____ [L. S.]

It is advisable that the sureties justify, but it is not absolutely necessary. Form of justification, see *supra*, at the end of the form of bond under the act of March 2, 1867..

Form of Writ of CERTIORARI under Sec. 7 of the Act of March 3, 1875.

THE PRESIDENT OF THE UNITED STATES OF AMERICA TO THE JUDGE OF THE COURT OF [here describe the State court by name].

Whereas it hath been represented to the Circuit court of the United States for the District of —, that a certain suit was commenced in the — court of [here name the State court] wherein —, a citizen of the State of —, was plaintiff and —, a citizen of the State of —, was defendant, and that the said — duly filed in the said State court his petition for the removal of said cause into the said Circuit court of the United States, and filed with said petition the bond with surety required by the act of Congress of March 3, 1875, entitled "an act to determine the jurisdiction of the Circuit courts of the United States, and to regulate the removal of causes from State courts and for other purposes," and that the clerk of the said State court above-named has refused to the said petitioner for the removal of said cause a copy of the record therein, though his legal fees therefor were tendered by the said petitioner:

YOU, THEREFORE, ARE HEREBY COMMANDED that you forthwith cer-

tify, or cause to be certified, to the said Circuit court of the United States for the District of —, a full, true and complete copy of the record and proceedings in the said cause, in which the said petition for removal was filed as aforesaid, plainly and distinctly, and in as full and ample a manner as the same now remain before you, together with this writ; so that the said Circuit court may be able to proceed thereon and do what shall appear to them of right ought to be done. Herein fail not.

[SEAL.] Witness the Honorable Morrison R. Waite, Chief-Justice of the Supreme Court, and the seal of the said Circuit court hereto affixed this the — day of —, A. D. 187 .

Clerk of said Circuit Court.

The writ of certiorari should be directed to the judge or judges of the State court, but a return to the writ duly certified may be made, it is supposed, by the clerk of the said court. *Stewart v. Engle*, 9 Wheat. 426. See Bacon's Abridg., title *Certiorari*; *ante*, sec. 10.

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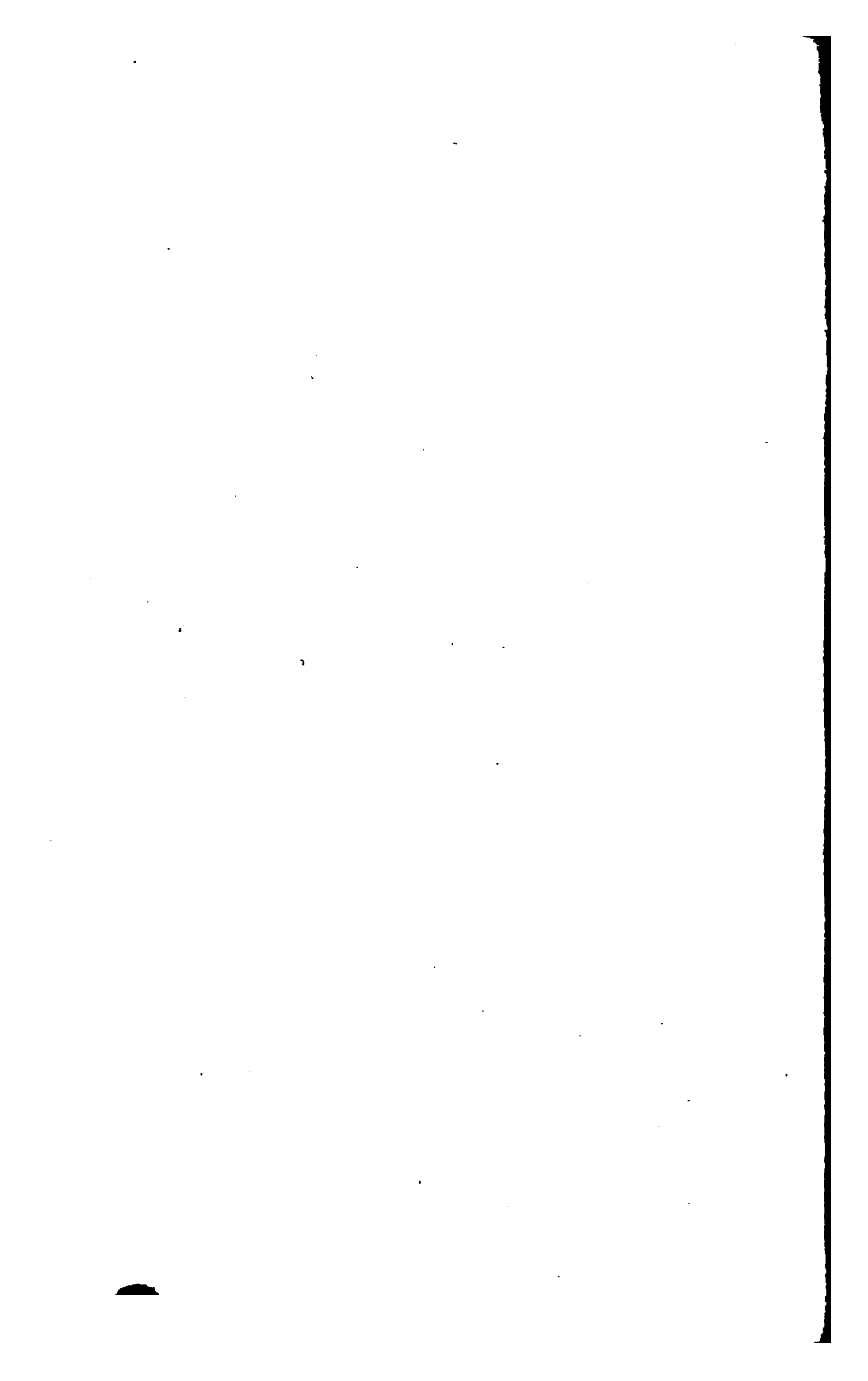
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THE CIVIL REMEDY

—FOR—

INJURIES ARISING FROM THE SALE OR GIFT

—OF—

INTOXICATING LIQUORS.

BY JOHN D. LAWSON,
COUNSELOR AT LAW.

ST. LOUIS:
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THE CIVIL REMEDY FOR INJURIES

ARISING FROM THE

SALE OR GIFT OF INTOXICATING LIQUORS.

SECTION 1. *Introduction—The Statutory Remedy.*

SEC. 2. The Laws of Maine, Connecticut, Indiana and New Hampshire.

SEC. 3. The Laws of Illinois, Iowa, Kansas, Michigan, New York, Ohio and Wisconsin.

SEC. 4. Who Liable—Master and Servant—Principal and Agent.

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SEC. 7. Injuries to the Person.

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SEC. 9. Injuries to Means of Support—Rights of Wife.

SEC. 10. Actual and Exemplary Damages.

SEC. 11. Pleading—Limitation.

SEC. 12. Evidence.—What Acts will Bar a Recovery.

SECTION 1. *Introduction—The Statutory Remedy.* The following discussion, relative to the traffic in intoxicating liquors, will be restricted to a consideration of the civil remedy given in many of the states for injuries resulting from the sale or gift of such commodities. It is not proposed that this shall be an argument, either in favor of or against the liquor trade. The sale of intoxicating liquors is, at common law, as lawful and as unrestricted as the sale of dangerous weapons or of poisonous drugs. But in this country, there has, within recent years, grown up a deep-seated prejudice, or perhaps to speak more correctly, an honest and sincere sentiment against this particular kind of commerce, which can

hardly be said to be the outgrowth of any party or of any sect. The advocates of this idea, having in some states become powerful enough to obtain temporary possession of the legislatures, have proceeded to prohibit its sale, either entirely or under extraordinary restraints; to treat the trade in spirits as an outlaw, and as an enemy to society and good government. In other states, and still more recently, its supporters have become sufficiently imprudent and ill-advised, to set the law at defiance, under the form of a modern crusade, thus retarding the advancement of their own opinions, by making those whom they regard as the enemies of sobriety and good morals the victims of injustice, and themselves the disturbers of the peace and of law and order. The difference between the rumseller who vends his wares in violation of law, and the prohibitionist who seeks to prevent him by conspiracy and riot, is certainly very slight; and it would seem that the latter has come to recognize the fact, that public opinion will not sustain even a meritorious object if sought to be attained by illegal means. It is more than probable that the advocates of prohibitory laws may never be successful. There are two considerations against which they are waging an almost hopeless war, the one without which a government can hardly endure, the other with which we do not desire to part even in the least—revenue and liberty.

The laws, which are the subject of this review, are open to no such objections; and that they have been adopted in but eleven states, is at least singular. In the enactment of the statutes giving a right of action for damages caused by the sale of intoxicating liquors, the legislatures have not sought to interfere with their sale, but have endeavored to give redress and compensation for damages actually inflicted by one person and suffered by another, in cases where no remedy was to be had under the law as understood and administered in the courts.¹ The seller of intoxicating liquors is made responsible for the injurious results of his

¹ *Bedore v. Newton*, 34 N. H. 117; s. c., 2 Cent. L. J. 363.

sales on the same principle as common carriers, bailees and agents are liable for the negligent conduct of their affairs. The statutes but extend a well-known principle of the common law, that one shall be held to strict account for the consequences of his acts, and the application of an ancient maxim that there is no wrong without its appropriate remedy. The traffic itself is not restricted. The dealer may sell, if he so desires; but he is required to be careful to whom he sells, not to sell enough to cause intoxication, nor to a person whom he knows to be in the habit of becoming intoxicated and wasting his own and his family's property, nor to add to an intoxication already commenced, and the consequences of which he may reasonably foresee.² The law does not say you must not deal in such wares. It says: "You may legally sell, but if what you sell produces intoxication and consequent damages, you must pay; if you sell to any one who is intoxicated, or who will use it to become so, you must take the risk of damages; you may do the legal act, but you must do it in a proper manner."³ An owner is not prevented from renting his premises for the purpose of liquor selling; but he is required to see that he rents them to persons who will so carry on their business, that no one shall be injured in person, property or means of support, by reason of such sales. It is required of the owner, who alone has the power to select his tenant, that he shall assume the risk of his tenant's acts in the business of selling intoxicating liquors.⁴ It is hardly necessary to say that such an action is purely the creature of the statutes. The familiar doctrines of the common law allowed of no such remedy, on account of the remoteness of the injury.⁵

The constitutionality of these acts has been more than once raised, but without exception they have been sus-

² *Bertholf v. O'Reilly*, 8 Hun, 18.

³ *Jackson v. Brookins*, 5 Hun, 535.

⁴ *Bertholf v. O'Reilly*, *supra*.

⁵ *Dillon v. Linder*, 36 Wis. 344; *Struble v. Nodwift*, 11 Ind. 64

tained.⁶ It has been settled that the right to sell intoxicating liquors is not one of the privileges and immunities of citizens of the United States, which, by the fourteenth amendment to the Constitution, the states are forbidden to abridge. The legislature has a right to prohibit the selling of articles which are considered injurious to society.⁷ The question is doubtful only, when such prohibitions interfere with the vested rights of property. This question was raised in the Supreme Court of the United States in the case last cited, but not decided, on the ground that it was not properly presented in the record. But from the expressions of the judges who delivered opinions then, it would seem that such rights in property, even when standing in the way of the public good, can be divested only by awarding proper compensation to the owner. But the question, as it arises under the damage acts, presents wholly different features. Under these acts, no property is taken away; only the use of a license is interfered with, and such a regulation can not be said to differ essentially from the provisions of the excise laws forbidding sales to minors or on Sunday. As the right of the legislature to restrain the sale of liquors is unquestionable, the person taking a license is subject to all existing laws, and to such as may thereafter be passed. The right given is personal, and may be wholly taken away, or it may be restricted or burdened with conditions or penalties to any extent the law-making power may deem proper. It is not a contract depriving the legislature of the right to act.⁸ The Supreme Court of the United States has very recently reiterated these views,⁹ as to the regulation of private property, wherever necessary for the public good.

⁶ *Bedore v. Newton*, 54 N. H. 117; s. c., 2 Cent. L. J. 363; *Mulford v. Clewell*, 21 Ohio St. 191; *Duroy v. Lechter*, 10 *Id.* 483; *Schafer v. Smith*, 4 Cent. L. J. 271; *State v. Johnson (Ill.)*, 3 Month. West. Jur. 72.

⁷ *Bartmeyer v. Iowa*, 18 Wall. 129.

⁸ *Baker v. Pope*, 2 Hun, 557.

⁹ *Munn et al. v. People*, 4 Cent. L. J. 250.

SEC. 2. *The Laws of Maine, Connecticut, Indiana and New Hampshire.*—The Maine law of 1858 contained a general provision that any person, not authorized under the act, selling intoxicating liquors, should be liable for all injuries committed by the person to whom the liquor was sold, while intoxicated, to be recovered in an action on the case;¹⁰ and a statute of Connecticut contains a somewhat similar provision.¹¹ A statute of Indiana, passed in 1853, but repealed two years later, gave a like remedy,¹² limited, however, to a suit on the bond of the vendor,¹³ and to the case of a licensed retailer.¹⁴ In 1873, an act, commonly known as the Baxter Law, was passed, giving to the wife, child, parent, husband, guardian, employer, or other person, a right of action for injuries caused to them by the sale of intoxicating liquors, against the seller, and the landlord of the premises where the sale took place. This was, however, repealed in 1875 by an act which restricts the right of action to damages caused by sales in violation of law.¹⁵

¹⁰ "If any person, not authorized as aforesaid, shall sell any intoxicating liquors to any person, he shall be liable for all the injuries which such person may commit while in a state of intoxication arising therefrom, in an action on the case, in favor of such person." Maine, Rev. Stats. of 1871, p. 304, sec. 32.

¹¹ "Whoever shall sell intoxicating liquor to any person who thereby becomes intoxicated, and while so intoxicated shall, in consequence thereof, injure the person or property of another, shall pay just damages to the person injured in an action on this statute; and if the person selling such intoxicating liquor is licensed, the recovery of a judgment for such damages shall be conclusive evidence of a breach of the bond." Revision of 1875, p. 269, sec. 9.

¹² "Any wife, child, parent, guardian, employer, or other person, who shall be injured in person, or property, or means of support, by any intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, shall have a right of action in his or her own name against any person, and his sureties, on the bond aforesaid, who shall, by retailing spirituous liquors, have caused the intoxication of such person, for all damages sustained, and for exemplary damages." Act of March 4, 1853, sec. 10.

¹³ Martin v. West, 7 Ind. 657. ¹⁴ Struble v. Nodwift, 11 Ind. 65.

¹⁵ The Indiana Act of March 17, 1875 (Acts Special Session, 1875, p. 55), requires a person to whom a license to sell spirituous liquors is granted to give a bond, with good sureties, in the sum of \$2,000, con-

Under the former law it was decided by the Supreme Court, in construing the provisions of the act, that in an action by a wife, under the statute, it was necessary for her to establish: 1. The intoxication of her husband, habitual or otherwise. 2. That she had been injured in person, or property, or means of support, in consequence of such intoxication. 3. That the intoxication from which the injury resulted was caused in whole, or in part, by the selling, bartering, or giving intoxicating liquors to the husband by the defendant.¹⁶ In New Hampshire, in case of the death or disability of any person in consequence of intoxication from the use of liquor unlawfully furnished, damages may be recovered by any one dependent upon the injured person, or upon whom the injured person is dependent for means of support, from the person unlawfully selling or furnishing the liquor.¹⁷ Under this act there are five different cases in which a remedy by action is given. All of them

conditioned that he will keep an orderly house, and pay all fines, costs, and judgments that may be rendered against him. Sec. 20 of this Act is as follows: "Every person who shall sell, barter, or give away any intoxicating liquors, in violation of any of the provisions of this act, shall be personally liable, and also liable on his bond, to any person who shall sustain any injury, or damage, to their person, or property, or means of support, on account of the use of such intoxicating liquors, so sold as aforesaid, to be enforced by appropriate action in any court of competent jurisdiction."

¹⁶ Fountain v. Draper, 49 Ind. 441.

¹⁷ "Whenever any person in a state of intoxication, shall commit any injury upon the person or property of any other individual, any person, who by himself, his clerk or servant, shall have unlawfully sold or furnished any part of the liquor causing such intoxication, shall be liable to the party injured for all damage occasioned by the injury so done, to be recovered in the same form of action, as such intoxicated person would be liable to, and both such parties may be fined in the same action; and in case of the death or disability of any person, either from the injury received as herein specified, or in consequence of intoxication from the use of liquor unlawfully furnished as aforesaid, any person who shall be in any manner dependent on such injured person for means of support, or any party on whom such injured person may be dependent, may recover from the person unlawfully selling or furnishing any such liquor as aforesaid, all damage or loss sustained in consequence of such injury, to be recovered in an action on the case; and any married woman

involve such private and personal relations as that of parent and child, husband and wife, and an injury to either, with a remedy to the other ; or, without such relations, a remedy, founded on an injury to person or property, by an action by the party injured. These cases are : The case of injury by one intoxicated to the person or property of another, with a remedy to such other ; the case of the death or disability of the person injured, from such injury, with a remedy to any person dependent on him for means of support ; the case of death or disability, in consequence of intoxication, with a remedy to such persons as are dependent on him for means of support ; the case of death or disability from the injury received, with a remedy to any person on whom the injured party may be dependent ; and the case of death or disability, in consequence of intoxication, with a remedy to any party on whom the injured person may be dependent.¹⁸

SEC. 3. *The Laws of Illinois, Iowa, Kansas, Michigan, New York, Ohio and Wisconsin.* In addition to the laws on this subject just cited, in seven other States, Illinois, Iowa, Kansas, Michigan, New York, Ohio and Wisconsin,¹⁹

may bring such action in her own name, and recover such damages to her own use." Laws of 1870, ch. 3, sec. 3.

¹⁸ *Hollis v. Davis*, 56 N. H. 74.

¹⁹ *Illinois*—Rev. Stats. Ill. Ch. 43, p. 439, approved March 30, 1874.—

SECTION 8. "Every person who shall, by the sale of intoxicating liquors, with or without a license, cause the intoxication of any other person, shall be liable for, and compelled to pay, a reasonable compensation to any person who may take charge of, and provide for, such intoxicated person, and \$2 per day in addition thereto for every day such intoxicated person shall be kept in consequence of such intoxication, which sums may be recovered in an action of debt before any court having competent jurisdiction."

SEC. 9. "Every husband, wife, child, parent, guardian, employer, or other person, who shall be injured in person, or property, or means of support, by any intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, shall have a right of action in his or her own name, severally or jointly, against any person, or persons, who shall, by selling, or giving, intoxicating liquors, have caused the intoxication, in whole, or in part, of such person, or persons ; and any person owning, renting, leasing, or permitting, the occupation of

statutes have been passed, and are now, and for some years have been, in force, providing a more complete remedy for damages resulting from the sale of intoxicating liquors. These statutes are substantially the same in their provisions

any building, or premises, and having knowledge that intoxicating liquors are to be sold therein, or who, having leased the same for other purposes, shall knowingly permit therein the sale of any intoxicating liquors that have caused, in whole or in part, the intoxication of any person, shall be liable, severally or jointly, with the person, or persons, selling or giving intoxicating liquors aforesaid, for all damages sustained, and for exemplary damages; and a married woman shall have the same right to bring suits, and to control the same and the amount recovered, as a *feme sole*; and all damages recovered by a minor, under this act, shall be paid either to such minor, or to his or her parent, guardian, or next friend, as the court shall direct; and the unlawful sale, or giving away, of intoxicating liquors shall work a forfeiture of all rights of the lessee or tenant, under any lease or contract, of rent upon the premises where such unlawful sale, or giving away, shall take place; and all suits for damages under this act may be by any appropriate action, in any of the courts of this State having competent jurisdiction."

SEC. 10. "For the payment of any judgment for damages, and costs, that may be recovered against any person, in consequence of the sale of intoxicating liquors, under the preceding section, the real estate and personal property of such person, of every kind, except such as may be exempt from levy and sale upon judgment and execution, shall be liable; and such judgment shall be a lien upon such real estate until paid; and in case any person shall rent, or lease, to another any building or premises to be used or occupied, in whole or in part, for the sale of intoxicating liquors, or shall knowingly permit the same to be so used or occupied, such building or premises so used or occupied shall be held liable for and may be sold to pay any such judgment against any person occupying such building or premises. Proceedings may be had to subject the same to the payment of any such judgment recovered, which remains unpaid, or any part thereof, either before or after execution shall issue against the property of the person against whom such judgment shall have been recovered; and when execution shall issue against the property so leased or rented, the officer shall proceed to satisfy said execution out of the building or premises so leased or occupied as aforesaid. *Provided*, that if such building or premises belong to a minor, or other person under guardianship, the guardian or conservator of such person, and his real and personal property, shall be held liable instead of such ward, and his property shall be subject to all the provisions of this section relating to the collection of said judgment."

SEC. 5. "No person shall be licensed to keep a dramshop, or to sell intoxicating liquors, by any county board, or the authorities of any city, town, or village, unless he shall first give bond in the penal sum of

and effect, and, for the purposes of this review, may be grouped together. In the first place, they differ from the laws of Connecticut, Indiana, Maine and New Hampshire, in giving a right of action for the consequences of the in-

\$3,000, payable to the People of the State of Illinois, with at least two good and sufficient sureties, freeholders of the county in which the license is to be granted, to be approved by the officer who may be authorized to issue the license, conditioned that he will pay to all persons all damages that they may sustain, either in person, or property, or means of support, by reason of the person so obtaining a license, selling or giving away intoxicating liquors. * * * Any bond taken pursuant to this section may be sued upon for the use of any person or his legal representatives, who may be injured by reason of the selling or giving away any intoxicating liquor by the person so licensed, or by his agent or servant."

Iowa—Code of 1873, Sec. 1556; see Sec. 8 of Illinois Act.

Sec. 1557; see Sec. 9 of Illinois Act.

SEC. 1558. "For all fines and costs assessed, or judgments rendered, of any kind against any person for any violation of the provisions of this chapter, the personal and real property, except the homestead as now provided by law, of such person as well as the premises and property, personal or real, occupied and used for that purpose, with the consent or knowledge of the owner thereof or his agent, by the person manufacturing or selling intoxicating liquors contrary to the provisions of this chapter shall be liable, and all such fines, costs, or judgments, shall be a lien on such real estate until paid; and when any person is required by Secs. 1528 and 1529 of this chapter to give a bond with sureties, the principal and sureties in the bond mentioned shall be jointly and severally liable for all civil damages, costs, and judgments that may be adjudged against the principal in any civil action authorized to be brought against him for any violation of the provisions of this chapter," etc.

Kansas—1 Dassler's Stats., Ch. 35, p. 354.

Sec. 9; see Sec. 8 of Illinois Act.

Sec. 10; see Sec. 9 of Illinois Act.

Michigan—Laws of 1871, p. 363. This act was approved and took effect April 20, 1871. Sec. 2 is as follows: "That every wife, child, parent, guardian, husband, or other person, who shall be injured in person, property, means of support, or otherwise, by any intoxicated person, or by reason of the intoxication of any person, shall have a right of action in his or her own name against any person or persons who shall, by selling or giving any intoxicating liquor or otherwise, have caused or contributed to the intoxication of such person or persons; and in any such action the plaintiff shall have the right to recover actual and exemplary damages. And the owner or lessee, or person or persons renting or leasing any building or premises, having knowledge that

toxication of a person, without regard to the unlawfulness of the sale. They even go further than this, in making no distinction between a sale and a gift. They provide that every husband, wife, child, parent, guardian, employer, or

intoxicating liquors are to be sold therein at retail as a beverage, shall be liable severally or jointly with the person so selling or giving intoxicating liquors as aforesaid. And in every action by any wife, husband, parent, or child, general reputation of the relation of husband and wife, parent and child, shall be *prima facie* evidence of such relation, and the amount recovered by every wife or child shall be his or her sole and separate property. Any sale or gift of intoxicating liquors by the lessee of any premises resulting in damage shall, at the option of the lessor, work a forfeiture of his lease; and the circuit court in chancery may enjoin the sale or giving away of intoxicating liquors by any lessee of premises, which may result in loss, damage, or liability to the lessor or any person claiming under such lessor." Comp. Laws, 1871, Vol. 1, Ch. 69, p. 690.

New York—*Laws of 1873, Ch. 646, Sec. 1.*—"Every husband, wife, child, parent, guardian, employer, or other person who shall be injured in person or property, or means of support, by any intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, shall have a right of action in his or her name against any person or persons who shall, by selling or giving away intoxicating liquors, [have] caused the intoxication in whole or in part of such person or persons; and any person or persons owning or renting or permitting the occupation of any building or premises, and having knowledge that intoxicating liquors are to be sold therein, shall be liable severally or jointly with the person or persons selling or giving intoxicating liquors aforesaid, for all damages sustained and for exemplary damages; and all damages recovered by a minor under this act shall be paid either to such minor, or to his or her parent, guardian, or next friend as the court shall direct; and the unlawful sale or giving away of intoxicating liquors shall work a forfeiture of all rights of the lessee or tenant under any lease or contract of rent upon the premises." (Rev. Stats., 1875, Vol. 2. p. 946.)

Ohio.—Act of May 1, 1854, 2 S and C. 1431. Section 6 of this act is substantially the same as section 1556, and section 7 as section 1557 of the Iowa code. By the Act of April 18, 1870 (Saylor 2360), section 7 of the Act of May 1, 1854, was amended so as to read like section 9 of the Illinois act. (3 Saylor's Stats. 2360, ch. 1871.)

Section 10 of the Act of May 1, 1854, is amended by Act of April 18, 1870, so as to read as follows: "For all fines, costs and damages assessed against any person or persons in consequence of the sale of intoxicating liquors, as provided in section 7 of this act, and the act to which this is amendatory, the real estate and personal property of such person or persons of every kind, without exception or exemption, except under the act to amend an act entitled an act to regulate judgments and executions at

other person, who shall be injured in person, or property, or means of support, by any intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, shall have a right of action in his or her own name

law, passed March 1, 1831 (Chase 826), passed March 9, 1840, took effect March 15, 1840 (Curwen, ch. 306), shall be liable for the payment thereof; and such fines, costs and damages shall be a lien upon such real estate until paid; and in case any person or persons shall rent or lease to another or others any building or premises to be used or occupied in whole or in part for the sale of intoxicating liquors, or shall permit the same to be used or occupied, in whole or in part, such building or premises so leased, used or occupied, shall be held liable for and may be sold to pay all fines, costs and damages assessed against any person or persons occupying such building or premises; and proceedings may be had to subject the same to the payment of any such fine and costs assessed or judgment recovered which remain unpaid, or any part thereof, either before or after execution shall issue against the property of the person or persons against whom such fine and costs or judgment shall have been adjudged or assessed; and when execution shall issue against the property so leased or rented, the officer shall proceed to satisfy said execution out of the building or premises so leased or occupied as aforesaid; and in case such building or premises belong to a minor, insane person, or idiot, the guardian of such minor, insane person or idiot who has control of such building or premises, shall be liable and account to his or her ward for all damages on account of such use and occupation of such building or premises, and the liabilities for the fines, costs and damages aforesaid; and all contracts whereby any building or premises shall be rented or leased, and the same shall be used or occupied in whole or in part for the sale of intoxicating liquors, shall be void; and the (lessee) person or persons renting or leasing said building or premises, shall, on and after the selling or giving intoxicating liquors, as aforesaid, be considered and held to be in possession of said building or premises." (3 Saylor's Stats., 2364, ch. 1871.)

Section 7 of the Act of 1870, is again amended by an Act of February 18, 1875 (4 Saylor's Stats., p. 3394), as follows: "Provided, that such husband, wife, child, parent, guardian, or other interested person liable to be so injured by any sale of intoxicating liquors to any person or persons aforesaid, who shall desire to prevent the sale of intoxicating liquors to the same, shall give notice either in writing or verbally before a witness or witnesses to the person or persons so selling or giving the intoxicating liquors, or to the owner or lessor of the premises wherein such intoxicating liquors are given or sold, or shall file with the township or corporation clerk in the township, village or city wherein such intoxicating liquor may be sold, notice to all liquor dealers not to sell to such person or persons any intoxicating liquors from and after ten days from the date of so filing said notice; and such notice or notices filed with such clerk

severally or jointly against any person who shall, by selling or giving away intoxicating liquors, have caused the intoxication in whole or in part of such persons, for all damages sustained from the effect of such intoxication, and for exemplary damages.²⁰ Under the Illinois and Kansas

shall be entered by the clerk of such township, city or village in a book to be kept for such purpose, which said book shall be open for the inspection of all, etc.; otherwise, the aforesaid injured person or persons shall not be entitled to real or exemplary damages for the alleged injuries which they may have sustained by the intoxication of any of the aforesaid persons, viz.: husband, wife, child, parent, guardian, employee or any other person or persons whomsoever; provided, that such notice, whether served personally or filed with the clerk as aforesaid, shall, during its existence, enure to the benefit of all persons interested.'

SECTION 2 makes it unlawful for any saloon keeper or other person to publish the fact of such notice having been given, by posting or printing in any paper or circular.

Wisconsin.—By section 1, ch. 127, of the Laws of 1872, it is declared to be unlawful for any person to sell intoxicating liquors without having first obtained a license therefor; and that no person shall be granted such a license without giving a bond "conditioned for the payment of all damages to any person, which may be inflicted upon or suffered by them, either in person or property, or means of support, by reason of obtaining a license, selling or giving away intoxicating drinks, or dealing therein;" and that such bond may be sued or recovered upon for the use of any person, or his legal representatives, who may be injured by reason of the selling or giving away of intoxicating liquors by the persons so obtaining the license. Section 6 of the same act is, in its provisions, like section 1 of the New York Statute. This section was repealed by ch. 179, Laws of 1874. Section 16 of the latter act reads as follows: "Any person or persons who shall be injured in person, property or means of support, by or in consequence of the intoxication of any minor, or habitual drunkard, shall have a right of action severally or jointly in his, her or their name against any person or persons who have been notified or requested in writing by * * * the husband, wife, parent, relatives, guardians or persons having the care or custody of such minor or habitual drunkard, not to part with liquor or other intoxicating drinks to them, and who, notwithstanding such notice and request, shall knowingly sell or give away intoxicating liquors, thereby causing the intoxication of such minor or habitual drunkard, and shall be liable for all damages resulting therefrom. A married woman shall have the same right to bring suit and to control the same as a *feme sole*." As to the effect of the amendment on causes then pending, see *Dillon v. Linder*, 36 Wis. 344; *Farrell v. Drees*, Supreme Court of Wis., Feb. Term, 1877.

²⁰ Rev. Stats. Ill., ch. 43, sec. 9: Iowa Code of 1873 sec. 1557; Kas. 1

Statutes, it is declared that any person who shall, in Illinois, by the "sale,"—in Kansas, by the "sale, barter or gift," of intoxicating liquor, cause the intoxication of another, shall be liable and compelled to pay a reasonable compensation to any person who may take charge of, and provide for such intoxicated person; and in Illinois "two dollars," in Kansas "five dollars" per day in addition thereto for every day such intoxicated person shall be kept in consequence of his intoxication, which sum may be recovered in an action of debt before any court having jurisdiction.²¹ In Iowa and Ohio, the right to recover such compensation is restricted to cases of unlawful sales of liquor, or sales made without the proper license, and to the sum of "one dollar" for each day.²² These sections, it may be observed, contemplate two conditions, in which the person cared for may be placed. For simply taking charge of and providing for him while drunk, a reasonable compensation is allowed; while for keeping him in consequence of his intoxication—as when sickness ensues, or if while drunk he injures himself, or becomes disabled, and it thereby becomes necessary that care should be bestowed upon him—a sum certain is allowed to be recovered from the seller. And as no more than the penalty can be recovered under the latter part of the section, evidence of what it was worth to care for the person injured is inadmissible.²³ A wife may recover under this section the stated compensation for taking care of her husband while intoxicated, in addition to any injuries to person or property, or means of support, for which she may claim damages under the other sections.²⁴

Besides the personal liability of the vendor or donor of intoxicating liquors for all damages arising therefrom, under

Dassler's Stats. ch. 35, sec. 10; N. Y. Laws of 1873, ch. 646, sec. 1; Ohio, Saylor, 2360, sec. 7; Mich. Laws of 1871, Vol. 1, ch. 69, sec. 2; Wis. Laws of 1872, ch. 127, sec. 1.

²¹ 1 Dassler's Stats., ch. 35, sec. 9; Rev. Stats. Ill., ch. 43, sec. 8.

²² Iowa Code of 1873, sec. 1556; Ohio, 2 S. and C. 1431, sec. 6.

²³ Brannan v. Adams, 76 Ill. 335.

²⁴ Wightman v. Devere, 33 Wis. 370.

the statutes of Illinois, Michigan, New York and Ohio, any person owning, renting, leasing or permitting the occupation of any building or premises, and having knowledge that intoxicating liquors are to be sold therein, or who having leased a building for other purposes, shall permit the sale of intoxicating liquors therein, which may have caused, in whole or in part, the intoxication of any person, is made liable, severally or jointly, with the person or persons selling or giving the intoxicating liquors, for all damages that may be sustained from such sale or gift, and likewise for exemplary damages.²⁵ By the Illinois, Iowa and Ohio statutes, the premises in which the sale is made are liable, and a judgment obtained under the acts becomes a lien upon the property, whether owned by the person who sold or gave away the liquor, or by one who has rented it to be used for the sale of intoxicating liquors, or though leased or rented for another purpose, permits it to be used in such manner;²⁶ and proceedings may be had to subject the premises to the payment of a judgment, either before or after execution is issued against the property of the person against whom the judgment may have been recovered. And if the building or premises belong to a minor, or other person under disability, the guardian or conservator of such person, and his real and personal property, are liable in the place and stead of the property of his ward. In Illinois, Ohio, New York and Michigan, the sale or gift of intoxicating liquors, contrary to the provisions of the act, works a forfeiture of all rights of the lessee or tenant under any lease or contract of rent upon the premises, where such unlawful sale or gift takes place.²⁷ The court of chancery, under the last statute, is authorized to enjoin the sale or gift of intoxicating liquors, by any lessee of premises, which may result in liability on the part

²⁵ Rev. Stats. Ill., ch. 43, sec. 9; Mich. Laws of 1871, Vol. 1, ch. 69, sec. 2; N. Y. Laws of 1873, ch. 646, sec. 1; Ohio (Saylor) 2360, sec. 7.

²⁶ Rev. Stats. Ill., ch. 43, sec. 10; Code of Ia. sec. 1558; Ohio (Saylor) Stats., 2364, ch. 1871.

²⁷ Rev. Stats. Ill. ch. 43, sec. 10; N. Y. Laws of 1873, ch. 646, sec. 1; Ohio (Saylor) 2360, sec. 7; Mich. Laws, 1871, ch. 69, sec. 2.

of the lessor. Under all the statutes, a married woman is given the right to bring suits, and to control them and the amount recovered, as a *feme sole*, and all damages recovered by a minor are directed to be paid either to him or her, or to his or her parent, guardian, or next friend, as the court may order.

In Illinois, Iowa, and Wisconsin, a party applying for leave to sell intoxicating liquors is required to give a bond, with sureties, conditioned to pay all damages that may be sustained by any one from the sale, either in person, property, or means of support. A bond, given in pursuance of this provision, may be sued upon for the use of any person, or his legal representatives, who may be injured by reason of the selling or giving away of intoxicating liquor by the person licensed, or his servant or agent.²⁸ This section of the act, and the section giving a general cause of action by the parties therein named, are to be construed together; the latter defining more specifically and limiting the obligation of the bond required by the former.²⁹

By recent amendments to the statutes of Ohio³⁰ and Wisconsin,³¹ the liability of the seller is restricted to the consequences of sales made after notice to him not to sell to the person intoxicated, given by any of the parties mentioned in the acts as having the right of action.

Under the statutes of the seven states which we have classed together, it has been remarked that the liability for the sale or gift does not, in case of damage resulting, depend upon its unlawfulness.³² Herein the liability differs from that created under the laws of Connecticut, Maine, Indiana and New Hampshire, where the remedy is given only when the transaction has been in violation of law,—such as a sale by an unlicensed person, or to a minor or habitual drunkard,

²⁸ Rev. Stats. Ill. ch. 43, sec. 5; Code of Ia. sec. 1558; Wis. Laws of 1872, ch. 127, sec. 1.

²⁹ State v. Ludington, 33 Wis. 107.

³⁰ Act of 1875 (4 Saylor, p. 3394).

³¹ Laws of 1874, ch. 179, sec. 16.

³² Hayes v. Phelan, 4 Hun, 732.

or to one after notice from his wife or family of his dissolute habits. It may be here remarked, however, that the Ohio statute, although wanting the proviso, "contrary to the provisions of this act," has been construed to authorize actions of this kind in cases only where the sale has been unlawful. But this construction was arrived at upon a consideration of several acts passed at different times, and amended at different periods, and is neither in accordance with the wording of the laws, nor the decision of a court of final resort.³³ And except in this instance, it has not been attempted to evade the law and the intention of its framers by such an interpretation. A defendant may, it seems, nevertheless show that he had been licensed to sell spirituous liquors, and was legally selling them under that authority on the occasion complained of, not as a defense, but in mitigation of damages.³⁴

SEC. 4. *Who Liable—Master and Servant—Principal and Agent.*—The words "any person," as used in the statutes, are very broad, and embrace all persons making the sale, without regard to their capacity—whether owner, son, clerk, or servant.³⁵ With regard to the proprietor, in the construction of these statutes, the doctrine of agency, the liability of the master for the acts of his servant in the

³³ *Granger v. Knipper*, 2 Cin. 490; *Mason v. Shay*, 7 C. L. N. 152.

³⁴ 8 Alb. L. J. 135.

³⁵ *Worley v. Spurgeon*, 38 Ia. 465.

The servants, as well as the principals, are liable in criminal prosecutions under the liquor laws. *State v. Schicker*, 33 Ia. 195. And assuming to act as agent for the owner without authority will not exonerate one from the responsibility; though merely acting as messenger, as in transmitting the liquor from the seller to the buyer, and the money from the buyer to the seller, would hardly bring him within the statute. *Com. v. Williams*, 4 Allen, 587. But see, *Johnson v. People*, 3 West. M. Jur. 723. Evidence that his employer had prohibited him from selling in his shop would be inadmissible in his behalf. *Com. v. Tinkham*, 14 Gray, 12. So in suits to recover penalties under the acts. *Roberts v. O'Connor*, 33 Me. 496. As to the liability of a servant in a social club, who deals out liquors to its members, see *State v. Mercer*, 32 Ia. 405, and of the members themselves, *Marmont v. State*, 48 Ind. 21; *Com. v. Smith*, 102 Mass. 144.

course of his employment, has been strictly applied. One engaged in the sale of intoxicating liquors is held responsible for the acts of his servants in that business, even though in the particular transaction they disobeyed his instructions.³⁶ "No man," says Cooley, C. J., in a leading case under these statutes,³⁷ "can be excused from responding for the negligent conduct of his servant because of having instructed him to be careful, or for his frauds because of having told him to be honest." He is not liable for wrongs done by the servant outside of his employment; but he is responsible for everything arising in the course of his business, and the fact that he gave orders to the contrary does not relieve him from liability if they be disobeyed.³⁸ It is essential, however, that the sale should have been with the consent of the owner or servant, and a subsequent ratification will not render him liable. The case of *Kreiter v. Nichols*³⁹ is in point here. In this case the evidence showed that the intoxicating liquors were not furnished to the husband of the plaintiff by the defendant himself, but that he refused to let him have the liquor, and instructed his servants to do the same, which they did. It appeared, however, that the defendant kept a grocery store, at which liquors were sold, and he was also a brewer of lager beer, and it was not disputed that the husband, who had been an employee of defendant, had procured liquor at the store, and had drunk beer at the brewery on several occasions. The trial judge charged the jury that the defendant would be liable for the sales in violation of his orders, if, when he found it out, he charged the liquors to him and deducted the amount from his wages. On appeal, the judgment was reversed for error in this instruc-

³⁶ *Peterson v. Knoble*, 35 Wis. 80; *Smith v. Reynolds*, 8 Hun, 128; *Keedy v. Howe*, 79 Ill. 133.

³⁷ *Kreiter v. Nichols*, 28 Mich. 496. But see *Oviatt v. Pond*, 29 Conn. 479.

³⁸ But in criminal prosecutions the rule is different; and if a servant sell, in violation of law, without the knowledge and against the instructions of his employer, the latter is not responsible. *Lathrope v. State*, 51 Ind. 192; *O'Leary v. State*, 44 Ind. 91; *Wreidt v. State*, 48 Ind. 579.

³⁹ 28 Mich. 496.

tion. The court held that no such principle, as above stated, could be applied to the case of a person who, without the permission of the owner, obtains his liquor, and that the fact of the owner demanding and receiving pay for it could not make him a wrong-doer in the original trespass on his rights. "By the statute law of this state," say the court, "as well as by the common law, beer is recognized as property, and the brewing of beer is a lawful business. The law protects this property precisely as it protects any other lawful product. If one steals it from the owner, he is punished for it; if he converts it to his own use in any form, a civil action will lie to recover from him the value. And this civil action would not depend in any degree upon the method or purpose of the conversion. Whether destroyed from a belief in its deleterious effects, or made way with in carousals or private drinking, the legal responsibility to pay for its value would be the same. And it will scarcely be disputed that, in this case, if defendant's statement is truthful, he might have recovered from the husband the value of the beer, on the same grounds precisely as he might have recovered for any unlawful conversion of other property. But if defendant might lawfully recover for the conversion, he might, also, lawfully settle for it. He does not thereby sanction what was originally done; but he makes one who has done him a wrong compensate him for the wrong."

It is not necessary that the party selling should compel the purchaser to drink, or use any art, device or trick, to cause him to become intoxicated, or know that he would become so.⁴⁰

SEC. 5. *The Joint Liability of Several Sellers*.—A seller of intoxicating liquors by which another is injured in person, property or means of support, is not released from liability, if a part of the liquors causing the intoxication was sold by others. He is liable if he contributed to the result.⁴¹

⁴⁰ Barnaby v. Wood, 50 Ind. 405.

⁴¹ Woolheather v. Risley, 38 Iowa, 486; Fountain v. Draper, 49 Ind. 441.

This proceeds upon the well-settled principle, that where a person undertakes to do an unlawful act, which will result in injury to another, and uses the means calculated to produce such a result, the fact that other persons may have been engaged in producing the same result will not exonerate him from the consequences of his act. From his using the means, the law presumes not only that he intended to produce the result, but that the common intent which will create mutual liability exists without proof of a previous agreement, or a common understanding, when the means employed lead to that inference. Therefore, it will not avail the defendant to show that others sold the party liquor which may have contributed to his intoxication.⁴² "If two persons willfully administer distinct portions to

⁴² *Hackett v. Smelsey*, 77 Ill. 109; *Emory v. Addis*, 6 Ch. L. N. 336.

The rule in criminal law is, that if persons, combining in intent, perform a criminal act jointly, the guilt of each is the same as if he had done it alone, and it is the same if, the act being divided into parts, each proceeds with his several part unaided. And if, while persons are doing what is criminal, another joins them before the crime is completed, he becomes guilty of the whole; because he contributed to the result. But if, in these cases, there is no mutual understanding of each other's purpose, each who contributed to the result will be responsible simply for what he personally meant. 1 *Bishop on Crim. Law*, 630, 642. So all joint tort-feasors are jointly liable where, in legal consideration, the act complained of might have been committed by more than one, and a joint action may be brought against several for an assault and battery, or a malicious prosecution. The question of the joint liability of several sellers of liquors, under the statutes, has generally been decided, when not specially enacted, upon the common-law principle governing the liability of joint tort-feasors. But it is submitted that the rule, as stated in the text, having regard to the result and the separation of the damages, is the correct one. The case of *Stone v. Dickenson*, 5 Allen, 29, has been looked upon as settling the question. Nine different creditors wrongfully sued out writs against their debtor: placed them in the hands of the same officer, who arrested the debtor on all the writs at the same time; each creditor being ignorant of what the other was doing; it was held that they were jointly or severally liable, though there was no preconcerted action. *Bigelow*, C. J., said: "As a matter of first impression, it would seem * * * they could not be regarded as co-trespassers in the absence of proof of an intention to act together, or of knowledge that they were engaged in a common enterprise. But a careful consideration of the nature of the action and of the wrong done

another, which together produce death, will it be claimed that neither of the parties can be punished, because the death was not solely caused by the poison administered by either one of them? If plaintiff's husband had taken one or more glasses of liquor at some place other than at defendant's saloon, which did not intoxicate him, and before

* * * will disclose the fallacy of this view of the case. The wrong which constitutes the gist of the action is, that he has been unlawfully arrested. * * * It is only one wrong. The error consists in supposing that the several parties * * * can not be regarded as co-trespassers, because it does not appear that they acted in concert, or knowingly employed a common agent. Such preconcert or knowledge is not essential to the commission of a joint trespass. It is the fact that they are all united in the wrongful act, or set on foot, or put in motion the agency by which it was committed, that renders them jointly liable to the person injured." On the other hand, several cases have been cited as establishing a contrary doctrine. In *Auchmuty v. Ham*, 1 Denio, 495, it was held, that where dogs belonging to several owners are found in company engaged in killing sheep, each owner is responsible for the injury done by his own dog, and for no more. In this case, the trial court instructed the jury "that the defendant was liable to pay for all the sheep of the plaintiff which had been killed or bitten by dogs between the first of July and the first of October, 1843," against a contrary instruction asked by defendant—"that he was only chargeable for the injury done by his own dog," etc. *Jewett, J.*, said: "The court should have charged that the plaintiff was entitled to recover of the defendant the value of all the sheep of the plaintiff which, from the evidence in the case, they were satisfied the defendant's dog had killed or wounded; and that he was not accountable for such as *Minkler's* dog had killed, nor for any damage done the plaintiff's flock of sheep by other dogs than his own." To this and other cases of like character it is answered, that separate owners are not at common law jointly liable for injuries jointly committed by their respective animals, though all happens as part of a single transaction. In such cases each owner is liable only for the injuries committed by his own animal, because of his negligence in permitting it to run at large. This *neglect* is the ground of the owner's liability. As the animals are supposed to be under the separate control of each owner, and his negligence is distinct from that of the other, and not in furtherance of a common object, they can not be jointly liable, because the wrongful neglect of each is wholly independent, and the damages are not the direct result of the act. There is no concurring agency of the owners in the trespass. If, however, the separate owners of such animals keep them in common, and suffer them to run at large as one herd or body, then they are jointly liable for all damages by the united trespasses of all, or any, of the animals. *Jack v. Hudnall*, 25 Ohio St. 255; *Boyd v. Watt*, 27 Ohio St. 259.

its effect had passed off, he obtained several glasses of liquor from defendant which, together with that previously drunk, did cause intoxication, are both of the defendants to be deemed innocent, or are they both guilty?"⁴³ Clearly the latter rule must be adopted in such cases.

But a different rule must be adopted where the wrongs are successive and independent, though committed against the same person. There must be concurrent action, a co-operation, or a consent, or approval, in the accomplishment by the wrong-doers of the particular wrong, in order to make them jointly liable. For it has been held, that a joint action may not be brought against a physician who prescribed, and an apothecary who put up noxious medicines. In an Iowa case⁴⁴ it was held that the sale, by one defendant, of liquors to the husband of the plaintiff became an independent and complete cause of action, and a sale to him of intoxicating liquors by another person on the next day, the next week, or the next month, would not give a joint right of action for either the first or last sale. Each was complete in itself. This is true where the drunkenness complained of was not a single fit of intoxication.⁴⁵

The rule of joint liability would seem to apply specially to a case where several persons supply liquor to one who commits a trespass while in a state of intoxication, produced by the liquor so furnished.⁴⁶ And so it does, except under the New York statute, where it is held, that a joint action will not lie against two or more persons who separately, and at different times, and at different places, have sold liquor to the same person, each quantity of liquor having contributed to produce the intoxication that caused the injury.⁴⁷ But when any other rule than that before stated is adopted, the difficulty arises in this, that there can seldom be any mode of separating the liability of the different parties. If a

⁴³ Woolheather v. Risley, 39 Ia. 486.

⁴⁴ La France v. Krayner, 42 Ia. 143.

⁴⁵ Jewett v. Wanshura, 8 Ch. L. N. 324.

⁴⁶ Bodge v. Hughes, 53 N. H. 616.

⁴⁷ Jackson v. Brookins, 5 Hun, 530.

dozen sales are made by a dozen dealers, no inquiry is possible as to the particular glass of liquor which caused the intoxication, or as to the particular drink from the effect of which the damage arose.⁴⁸ But there may undoubtedly be cases where such a separation might be made. To take an illustration.⁴⁹ A, on the first day of January, sold a pint of whiskey to D, who paid for it; D's wife needed the money so expended, to buy bread. On the tenth of January B sold brandy to D, for which he paid the money; D's wife required the money at the time to pay for meat to eat. On the twentieth of January C sold a quart of whiskey to D and received payment, and D's wife needed the money to purchase raiment. On each occasion D became intoxicated, and wasted so much of the plaintiff's means of support, as he expended money in the purchase of the liquor, and time while so intoxicated. In such a case it might not be impossible to separate the damage resulting to the plaintiff from the acts of each. But the case is very different where successive sales by several have produced a particular intoxication from which the injury sued for has resulted; or where the damages result from the state or condition of one, caused by repeated sales for a series of years. To state the rule of joint liability which should govern in this class of cases briefly: 1. If the defendant is the sole cause of the intoxication, he is liable for all the damages resulting. 2. If some of the injury is caused by others, he is not liable for damages resulting from their sales. 3. But if the damages can not be separated, then he will be liable for all injuries to which he has contributed.

Where all are considered as joint wrong-doers, and each is liable for the injury done by all, all may be sued together, or one or any number of them separately; but there can be but one satisfaction for the injury.⁵⁰ A plaintiff can collect but

⁴⁸ *Kearney v. Fitzgerald* (Ia.), June Term, 1876.

⁴⁹ *Boyd v. Watt*, 27 Ohio St. 259; s. c., 3 Cent. L. J. 756.

⁵⁰ *Kearney v. Fitzgerald*, Supreme Court of Iowa, not yet reported; *Emory v. Addis*, 3 Ch. L. N. 336.

one sum, though several amounts may be awarded him in different actions. He is, however, entitled to the costs in each suit.⁵¹ But if he has prosecuted several jointly, and the jury has assessed a different sum as damages against each defendant, the plaintiff may enter judgment against all for any of the amounts as he elects.⁵²

On the other hand, where each seller is liable for the injuries produced by himself only, settling with, or suing one, will not release the others.⁵³

The common-law doctrines, concerning the liability of tort-feasors, and as to the joinder or separation of them in actions brought to recover damages for the wrong, are not affected by the new system of procedure introduced by the codes.⁵⁴ The question of misjoinder may be raised by demurrer, or the parties may apply for a severance. A neglect to demur does not waive this objection; as, under the codes,—and in nearly all of the states where this action is allowed, codes of procedure are in force,—the defendant may, at the trial, interpose the same objection to the plaintiff's recovery, though he has omitted to allege it on the record.⁵⁵ Whether it will be for the interest of a defendant, where several are joined, to obtain a severance, will depend upon the particular case. Though, as there can be but one satisfaction, it would seem to be to his interest to remain where he will have to assume but a share of the damages and costs. But it may happen that his connection with the injury to the plaintiff has been only slight, while that of his co-defendants may have been of such a nature as to sustain a claim for punitive or vindictive damages;—a claim which, under some circumstances, as will be seen in a subsequent section, where the question of damages is more fully considered, may be allowed.

⁵¹ Pomeroy on Remedies, 314.

⁵² *First Nat. Bank v. Indianapolis*, 45 Ind. 5.

⁵³ *Jewett v. Wanshura*, 8 Ch. L. N. 324.

⁵⁴ Pomeroy on Remedies, 307.

⁵⁵ *Ib.* 291; *Jackson v. Brookins*, 5 Hun, 533, and cases cited.

SEC. 6.—*The Liability of Owners or Lessors of Premises.* These statutes also, as has been seen, give a right of action against the owner or lessor of the premises, where the sale is made, severally or jointly with the person making the sale, where the owner has leased or rented the property for such a purpose, or has knowledge that intoxicating liquors are being sold therein.⁵⁶ While the plaintiff may bring an action against the seller of liquors causing intoxication and damage alone, and having recovered judgment, by another action against the owner, enforce it, yet he has the right to join them in one action, and therein obtain complete relief.⁵⁷ And the judgment so recovered may be reversed as to one and affirmed as to the other.⁵⁸

This part of the law, however, does not apply to the owner of premises, who himself sells liquor therein. Therefore, where the owner sells in violation of the act, he is liable because of his sales, and not on account of his ownership of the premises in which the sales are made; and to proceed against him, under this section, in such a case, would be improper.⁵⁹ What will amount to "knowingly permitting" or "suffering" intoxicating liquors to be sold in violation of the statutes, on the part of a lessor of premises, who may have rented them for legal purposes, the lessee subsequently engaging in illegal sales, has been the subject of considerable discussion. Must he not, it has been suggested, have a present absolute right to control the use, before he can be said to permit? Can permission exist without active participation in the control of the property? Can the law be construed as laying hold of the lessor as a hostage for the lawful behavior of his tenant, and hold him to knowingly permit, where he merely knowingly suffers the unlawful act to be done by one who has exclusive control as against him and all the world? If

⁵⁶ *Bertholf v. O'Reilly*, 8 Hun, 15.

⁵⁷ *La France v. Kray*, 42 Ia. 143.

⁵⁸ *Rengler v. Lilly*, 26 Ohio St. 48.

⁵⁹ *Barnaby v. Wood*, 50 Ind. 405.

obliged to resort to law for an injunction to restrain or to compel a forfeiture, the breach of duty being of conditions subsequent, will not the very law which exacts a resort to it, apply the strictest rules to the lessor's case, and estop him from a remedy upon the slightest grounds of acquiescence, such as once accepting rent after having reasonable grounds to believe in the existence of the unlawful user, or deny him relief, except upon proof beyond a reasonable doubt?⁶⁰ It is, we apprehend, a sufficient answer to this objection to say that the owner is entirely protected, under the very sections of the statutes creating his liability, by the forfeiture which ensues upon the sales being made by the tenant. He is not required to move until the forfeiture is complete, and he will not be held liable unless he does some affirmative act signifying his assent to the use of his property for such purposes, or his permission for its continuance.⁶¹ Mere inactivity on his part to find out the fact, or a failure to take steps to prevent such a use of the premises, will not render him liable.⁶² The permission to occupy the premises, with knowledge that intoxicating liquors are to be sold therein, constitutes the basis of the liability imposed by the act. Neither the permission nor the knowledge is to be presumed or inferred, but should be established by clear and satisfactory proof. It is doubted whether, considering the relations of the parties, the occupation, by the husband, of premises belonging to his wife, where he and she reside, is such a permission to occupy as would make her liable under the statute. And it has been held that from the mere fact that the wife, the owner of the premises, lived with her husband in a hotel, it could not be inferred that she had knowledge that intoxicating liquors were sold therein, it not being proved that she ever witnessed a sale, or had ever been present in the bar-room where the sales were made, or had ever given her consent that such sale

⁶⁰ *Granger v. Knipper*, 1 Cin. (S. C.) 480.

⁶¹ *State v. Ballingall*, 42 Ia. 87.

⁶² *State v. Abraham*, 6 Ia. 117.

should be made, or that she was informed that they were in fact made, or of any circumstances tending to induce such an inference.⁶³ But general reputation of the place being used for the purpose of selling spirituous liquors is admissible on the question of the defendant's knowledge.⁶⁴ Where it was proved that the defendant by a written lease let a building to one F for the sale of liquor, on an understanding that F was to occupy it for that purpose, and F did occupy it for that purpose, it was held that such facts would sustain an allegation of "suffering" the premises to be occupied for the purposes named, as well as an allegation of "letting" for a like purpose.⁶⁵

Again, a landlord certainly has power to prevent the use, by his lessee, of his property for illegal purposes, as he has power to restrain the use of his property for a purpose different from that for which it was leased, or for a purpose which may render it dangerous,⁶⁶ and this on general principles, without regard to the statutory provisions which declare a forfeiture, and, in one case, expressly empower the court to enjoin this particular use of property.⁶⁷ And where a landlord seeks to avoid a lease for a violation of the act on these grounds, the defendant can not prevent such avoidance by showing a payment of rent for the entire term.⁶⁸

The Ohio law provides that all contracts, whereby any building or premises shall be rented and leased, and used or occupied in whole or in part for the sale of intoxicating liquors, shall be void, and the person renting or leasing the premises shall, upon such a sale taking place, be considered and held to be in possession of the premises.⁶⁹ The existence of two conditions is necessary to render a contract void under this statute. 1. The building

⁶³ Mead v. Stratton, 8 Hun, 151.

⁶⁴ State v. Shanahan, 54 N. H. 437.

⁶⁵ *Ibid.*

⁶⁶ Bennet v. Sadler, 14 Ves. 526; Mayor v. Bolt, 5 Ves. 129.

⁶⁷ Mich. Stats., *supra*.

⁶⁸ McGarvey v. Puckett, 27 Ohio St. 669.

⁶⁹ Ohio Law, *supra*.

or premises must have been rented or leased for the sale of intoxicating liquors. 2. The leased property must be used or occupied for that purpose. The mere use or occupation of the property by the tenant for the purpose indicated is not enough; it must have been contemplated at the time of the making of the lease. Neither is it sufficient, that such a use of the lease was contemplated at the making of the contract by the tenant; it must have been known to the lessor. From its wording, the meaning of the statute is very ambiguous; but, as used in this section, the lessor is the actor, and it is the lessor, and not the lessee, who is "to be considered and held to be in possession," on and after the sale.⁷⁰ The difference between this section and the sections contained in the several acts, in relation to forfeitures is, that in the other cases the use of the premises by the tenant for the sale of intoxicating liquors renders the lease void at the election of the lessor, while in this the lease becomes void as to both parties.⁷¹

The word "premises," as used in the statutes, includes lands and tenements. Therefore, a justice of the peace in most of the states would not have jurisdiction in an action against the owner or lessee of premises, who knowingly permits liquor to be sold therein, whereby injury is sustained, such an action being one in which the title to real estate is drawn in question.⁷² If the sale be made upon any portion of the property leased, it works a forfeiture of the whole. Therefore where the act which it was claimed forfeited the lease was committed in a grocery store upon the property leased, judgment was held to be properly rendered by the restitution of the whole premises of 350 acres.⁷³

The provisions of the statutes declaring that real estate not owned by the seller, but wherein the sale is made, shall

⁷⁰ Zink v. Grant, 25 Ohio St. 353.

⁷¹ Justice v. Lowe, 26 Ohio St. 373.

⁷² Bowers v. Pomeroy, 21 Ohio St. 184.

⁷³ McGarvey v. Puckett, 27 Ohio St. 672.

be held liable for the payment of a judgment against him, do not create a lien upon the property, but simply authorize it to be subjected to the payment of the judgment in a suit against the owner, instituted for that purpose. Until the commencement of a suit against him, the judgment creditor acquires no interest in the property; and if before the suit is brought it has been sold and conveyed, it can not be subjected to the payment of such a judgment. To construe the statutes, so as to make a judgment against the seller a lien on the property, either from the rendition of the judgment against the seller of the liquor, or from the time the action accrued, would render titles to land very insecure. No one could safely purchase real estate on the faith of the records showing that it was free from incumbrances. He would be obliged to search for the previous occupiers of the property, and to ascertain whether any judgments or causes of action existed against them while in possession.⁷⁴

The statutes of Illinois, Iowa, Kansas, Michigan, New York, Ohio and Wisconsin, give a right of action for three separate descriptions of injury caused by the sale of intoxicating liquors, viz.: Injury to the person, to property, and to means of support.

SEC. 7. Injuries to the Person.—To sustain the action for injuries to the person, an assault, or some actual violence, or physical injury to the person, or health, must be shown.⁷⁵ So, where the plaintiff charged that in conse-

⁷⁴ Bellinger v. Griffith, 23 Ohio St. 619.

⁷⁵ Mulford v. Clewell, 21 Ohio St. 193.

Under a statute of Missouri, making it a ground for divorce at the suit of a wife, if the husband shall "offer such indignities to her person as to render her life and condition intolerable and burdensome," it was held, in Cheatham v. Cheatham, 10 Mo. 296, overruling Lewis v. Lewis, 5 Mo. 278, that unfounded charges made and repeated against a wife by her husband, calculated to render her life intolerable, were not a sufficient ground for the granting of a decree. "If mere words," say the court, "will constitute the indignities to the person mentioned by the statute, by what standard of refinement shall the offended sensibilities of the

quence of his intoxication her husband at times became delirious, wild and dangerous, compelling her to nurse and attend him, and that she had been put to much fear, and had been forced to abandon his house on account of his bad conduct and disagreeable society, but complained of no actual violence, it was held that the action could not be sustained for injury to her person. "Mortification and sorrow and loss of her husband's society is not enough. This is her misfortune, for which she has no remedy under the law. If she had been attacked by her drunken husband and injured by his violence, she could recover."⁷⁶ But under the Wisconsin statute, where the husband, while intoxicated, without actual violence, but by threats and abusive language and intimidation, drove his wife out of his house, and kept her out for several hours, it was held that this constituted a physical injury and suffering sufficient to sustain an action.⁷⁷

SEC. 8. *Injuries to Property*.—The term "property," as used in these statutes, requires no special construction. Damages caused through the squandering of the money or chattels of a wife, or other person,⁷⁸ or the value of the property destroyed by a person while intoxicated, may be recovered under this section from the seller of the liquor causing the intoxication.⁷⁹ Unlawfully depriving a person of his money or other property, upon general principles, creates a right of action in favor of the party injured, and these principles apply equally to the case of one obtaining

female be estimated? Natural temperament, education and the associations of life will very much vary the degree of unhappiness and discomfort, which reproaches of this character would be likely to produce. If words, unaccompanied with actual violence, constituted the charge, they must have been such as to inflict indignity and threaten pain, and produce a reasonable apprehension of injury to the person or health of the party complaining." *Hooper v. Hooper*, 19 Mo. 355.

⁷⁶ *Mulford v. Clewell*, 21 Ohio St. 193; *Albrecht v. Walker*, Supreme Court of Illinois, not yet reported.

⁷⁷ *Peterson v. Knoble*, 35 Wis. 80; *Wightman v. Devere*, 33 Wis. 570.

⁷⁸ *Mulford v. Clewell*, 21 Ohio St. 197; *Hemmes v. Bentley*, 32 Mich. 89.

⁷⁹ *Woolheather v. Risley*, 38 Ia. 187.

the money of another by the unlawful sale of intoxicating liquors. Therefore a party may sue for money paid during a period of time for liquor sold to him in violation of these statutes. And the same right exists in favor of his personal representatives, it being an injury to the estate of the intestate of a proprietary character, as distinguished from a mere personal injury.⁸⁰ No demand of the chattels, or notice of claim, is necessary before the suit can be brought. An action of this kind differs from an ordinary action for conversion of property; for it is not brought for the vendee's conversion, but for the act of the party making away with the property while under intoxication effected by the defendant. The wrongful act for which suit is brought is not the conversion of the property, but the sale of the liquor.⁸¹ And where a wife sues the vendor of liquors for the value of property belonging to her, which has been made away with by her husband, while under the influence of liquor supplied by the defendant; if, as between the plaintiff and the husband, the property was hers, whether it would have been hers as to creditors or a purchaser from her husband in possession, is not material; for the defendant in such a proceeding does not occupy either of these relations.⁸² Where the plaintiff's son took his horse, saying that he was going to visit a friend some miles distant, but instead of this went directly to the saloon of one of the defendants, where he became intoxicated, and while in such condition afterwards drove the horse so violently that it died; it was held, under the New York statute, that an action could be maintained against the saloon-keeper and the landlord of the premises jointly for the value of the horse.⁸³ And an action may be maintained by a person prevented from following his usual occupation by being struck, beaten or wounded by an intoxicated person, against

⁸⁰ Kilborn v. Coe, 48 How. (N. Y.) 141.

⁸¹ Mulford v. Clewell, *supra*.

⁸² Woolheather v. Risley, *supra*.

⁸³ Bertholf v. O'Reilly, 8 Hun, 16.

the seller of the liquor by which the intoxication was produced, and the owner of the building in which it was sold.⁸⁴

SEC. 9. *Injuries to Means of Support—Rights of Wife.*

—The term “means of support,” as used in the statutes under consideration, has received a different interpretation by different courts. The wife is the person whose damage in most cases is laid under these words, and a statement of the application and extent of the term requires an examination of the rights of a wife, under the law, to the support of her husband. Broadly, the phrase as used in the statutes relates to whatever a husband might have earned or made by his labor and attention to business, and contributed to the maintenance of his family.⁸⁵ A husband is morally and legally bound to supply his family with the necessities and comforts of life. If he have no other resources, it is his duty to contribute his labor and its proceeds to their support. A wife has thus an interest in his capacity to labor, and this especially, if she be wholly dependent. Therefore, his intoxication of itself, as affecting his capacity to labor, gives her a cause of action.⁸⁶ Nor is the liability of the defendant confined to cases of injury resulting immediately from drunkenness, or arising during its continuance; it extends as well where the injury results from insanity or sickness produced by intoxication.⁸⁷ Health is as indispensable to the ability to labor, as is the ability to labor to means of support. To sustain the action by the wife, it is not necessary that she has actually been without support, or at any time in whole or in part deprived of support. Means of support relate to the future as well as to the present. It is sufficient if the sources of her future maintenance have been stopped or diminished below what is reasonable for one in her station

⁸⁴ English v. Beard, 51 Ind. 489.

⁸⁵ Wightman v. Devere, 33 Wis. 570.

⁸⁶ Schneider v. Hosier, 21 Ohio St. 99.

⁸⁷ Mulford v. Clewell, 21 Ohio St. 191.

of life.⁸⁸ In Iowa, the refusal of the court below to charge the jury that, "if the plaintiff was in no worse condition after, or by reason of the sale of liquors to her husband, than she was before, she has not suffered in her means of support, and can not recover therefor," was held correct.⁸⁹ So, in Illinois, the ruling of the trial judge, in rejecting an instruction submitted by the defendant, that if the wife had sufficient means in her own right to maintain herself as comfortably as she was supported by her husband before the date of the charges, or was able and competent to earn her own livelihood, she could not maintain the action, was assigned for error but overruled. The Supreme Court said: "From the earliest period of the law, there has been a legal obligation on the husband to support his wife. No act of the legislature of this state, when this cause of action accrued, had ever abrogated such law. It has never been annulled by judicial construction, nor do we recognize in courts the right to annul it. The right of support is not limited to the supplying of the bare necessities of life, but embraces comforts that are suitable to the wife's situation and the husband's condition in life. Because the wife may be able-bodied and can earn a livelihood, it does not follow that she does not suffer injury in means of support by loss of her legal supporter. Nor does it so follow where she may have independent means of her own. There are always independent means of support. No one is absolutely dependent on another for means of support; for, where there is the absence of other means, it is provided by public authority."⁹⁰ But in a Wisconsin case it is intimated that, if the husband when sober was physically incapable of performing any work or labor, or attending to any business, or was of such indolent or shiftless habits that he in fact made his wife support him, his intoxication would not injure her means of support, as used in the

⁸⁸ *Mulford v. Clewell*, *supra*.

⁸⁹ *Woolheather v. Risley*, 38 Ia. 189.

⁹⁰ *Hackett v. Smelsley*, 77 Ill. 109.

statute.⁹¹ And in New York, the exposition of this phrase in all the other states has been entirely dissented from. The Supreme Court of that state, in one case, say, that the reasoning adopted in the other states, "if carried out consistently, would result in the doctrine that the wife has an interest in the property of her husband, so that she could maintain an action for its injury, as he is as much bound to support her out of his property as out of his wages; and that a creditor would be injured in his means of support by the intoxication of his debtor, for the debtor is as much legally and morally bound to pay his creditors as to support his wife."⁹² This extraordinary ruling stands alone, and seems to have been made without any regard to the obvious intent of the framers of these laws. But leaving this out of the question, it would certainly seem a sufficient answer to it, that in the same section the wife is authorized to bring an action for injury to her property, and that even at common law she may maintain a suit for an injury to her contingent interest in her husband's estate, though an interest which is not an actual one, but which the law considers as more than a possibility.⁹³ The fact that the wife is specifically mentioned in the statute, and the creditor is not, makes it unnecessary to consider whether legally their rights are precisely the same. An examination of this case shows, however, that the expression just quoted is more in the nature of a *dictum* than a judicial decision; and it may be considered as settled under this section, wherever it is found in the statutes of the states which have adopted the civil damage law, that the wages of the husband are part of the wife's means of support, in that they belong to her for that object; that a diminution of them from the causes stated will give her a right of action, and that having the right to rely upon the support of her husband, his previous conduct, except under extraordinary

⁹¹ *Wightman v. Devere*, *supra*.

⁹² *Hayes v. Phelan*, 4 Hun, 738.

⁹³ *Bullard v. Briggs*, 7 Flek. 533; *Buzick v. Buzick*, 3 Cent. L. J. 786.

circumstances, or the possession by her of independent means, will not alter the case. It has been held, however, under the New Hampshire statute, which makes a person unlawfully furnishing spirituous liquors responsible for injuries resulting therefrom, and gives a remedy to any person on whom such injured person may be dependent for means of support, that this does not give one upon whom a person becomes dependent in consequence of intoxication produced by liquor so furnished, and who was not previously dependent upon him, any right of action.⁹⁴

An action will lie, at the suit of a wife or child, against the seller of liquors to one who, while so intoxicated, and in consequence of such intoxication, receives injuries resulting in death.⁹⁵ In one of the earliest cases decided under the New York statute, a contrary conclusion was reached. There the complaint alleged that plaintiff's husband died early on the morning of the 5th of July; that he was intoxicated on the evening previous; that his death was caused by such intoxication, produced by the sale to him and others of intoxicating liquor, whereby an affray took place in which he was killed by one of his drunken companions, and that the plaintiff by reason thereof had sustained damages in being deprived of the companionship of her husband, and of the customary support and maintenance of herself and her children. The court held that this did not show any cause of action; that the intent of the statute was to throw the responsibility for the injurious acts of an intoxicated person on the vendor or giver of the intoxicating liquor, but not to make him liable for all results arising therefrom, and that under the statute a right of action existed against the donor or seller in cases alone where it would lie against the intoxicated person.⁹⁶ But this opinion may be said to be over-

⁹⁴ *Hollis v. Davis*, 56 N. H. 74.

⁹⁵ *Emory v. Addis*, 6 Ch. L. N. 335; *Jackson v. Brookins*, 5 Hun, 533; *Krach v. Hellman*, 4 Cent. L. J. 233; *Schmidt v. Mitchell* (Sup. Court Ill.), not yet reported; *Mason v. Shay*, 7 Ch. L. N. 152.

⁹⁶ *Hayes v. Phelan*, 4 Hun, 743.

ruled by a later case in the same court, where several persons became intoxicated and engaged in a drunken affray, in which one of their number was killed, and an action was brought against the sellers of the liquors which caused their intoxication. The opinion of the court in this case is an excellent exposition of the meaning and purposes of these statutes. "It is true," says the court, "the statute does not in express terms give the right of action upon the cause of death. It does not define the injuries meant to be covered, or enumerate them. It says, generally, 'injuries to person, property or means of support, in consequence of the intoxication of any person.' If death ensues, as the natural and legitimate result of the intoxication, it is covered by the language of the statute. All injuries are covered that are consequent upon the intoxication. If death were excluded, then the minor and temporary injuries would be provided for, while the greatest and most permanent of all would be excluded. The statute should not be so construed. It admits of the other construction, and that is more consonant with its benign purposes. Its main object was to provide a remedy for cases before remediless. Had it been confined to injuries to person and property, it might have been said, that only those injuries were meant to be covered, for which there was before then a remedy against the intoxicated person. But when it provided for injuries to means of support, it made actionable a new class of injuries without remedy at common law, and unprovided for by any previous statute. The wrong consisted in the fact that the sellers of liquors shut their eyes to the condition, in person or family, of those to whom they sold. They dealt out an article which, under certain circumstances often liable to exist and to be known to the seller, would, without fail, produce injury, and perhaps death. Carelessness and neglect, morally criminal, were shielded under the license law. For this wrong, the statute under consideration provided a remedy. Notice the class of persons especially endowed with a right of action ;

—husband, wife, child, parent, guardian. When the statute provided that any of them might have a right of action for any injury to his or her means of support, in consequence of the intoxication of any one, is it reasonable that the legislature only meant to provide for such causes of action, as before then already existed against the intoxicated person? It seems not; but that the main object was to provide a remedy for an evil entirely without remedy before. The law does not provide how the injury to the means of support must be produced in order to be actionable, when it is in consequence of intoxication. It is therefore without limit in that respect.⁹⁷

The fact of the marriage being illegal and void, if proved, will prevent the plaintiff from recovering for injury to means of support, but will not deprive her of the right to maintain an action against the seller of intoxicating liquors to her alleged husband, if she shall have sustained injuries to her person or property by reason thereof.⁹⁸

SEC. 10. *Actual and Exemplary Damages.*—The statutes authorize the recovery of damages co-extensive with the injury, and likewise exemplary damages. But it is well settled that exemplary damages can not be awarded without proof of actual injury; the seller can not be punished, even if he has sold in violation of the wishes of the friends and family of the drunkard, unless the party bringing suit has sustained an actual and substantial loss.⁹⁹ But if it appear that a wife has sustained actual damages to her means of support, exemplary damages may be awarded even without proof of aggravating circumstances, such as the defendants furnishing the husband with liquor after notice from her not

⁹⁷ Jackson v. Brookins, 5 Hun, 533.

⁹⁸ Kearney v. Fitzgerald, Supreme Court of Iowa, not yet reported.

⁹⁹ Ganssly v. Perkins, 30 Mich. 495; Wightman v. Devere, 33 Wis. 570; Keedy v. Howe, 79 Ill. 133; Roth v. Eppy, 16 Am. L. R. 111; Freese v. Tripp, 6 Ch. L. N. 330; Boyd v. Watt, 3 Cent. L. J. 756; Kellerman v. Arnold, 71 Ill. 632; Brantigan v. Waite, Blanke et al. v. Fulford, and Albrecht v. Walker, decided in the Supreme Court of Illinois, and not yet reported.

to do so, or endeavoring to prevent him from reforming by tempting or inducing him to drink intoxicating liquors.¹⁰⁰ But the fact of the wife having notified the seller not to sell to her husband should always enhance the damages;¹⁰¹ for he can in such a case have no excuse for his conduct, and his disregard of the law and of the rights of others may well merit the award of punitive damages. In a recent case,¹⁰² in speaking of exemplary damages, it was said, where a seller of intoxicating drinks had been notified not to sell in a particular case, or where he placed temptations in the way of one to seduce him from the paths of sobriety, or where one, who had been an habitual drunkard, was endeavoring to reform and free himself from the toils in which he had been bound, if he should be interfered with by the dram-seller, to conquer his resolution, such a person would be a fit subject for exemplary damages, and such damages, so awarded, would be in the nature of compensation to the injured party. And though, as has been seen,¹⁰³ anguish of mind and mental suffering do not constitute such an injury as to be the ground for an action under these statutes, yet actual damages being proved, they may be taken into consideration upon the question of exemplary damages.¹⁰⁴ "Whatever may be the rules of the common law," it is said in an Ohio case, "as to the state of facts necessary to justify the assessment of exemplary damages, it is clear that exemplary damages may be recovered in any action brought under this section, in which the evidence shows a right to recover actual damages."¹⁰⁵ And in the same state an action was brought under the act of 1854 by several railroad contractors who had in their employ a number of hired hands, for the sale to them by the defendants of intoxicating liquors, "whereby they became drunk, unable themselves

¹⁰⁰ Hackett v. Smelsley, 77 Ill. 109.

¹⁰¹ McEvoy v. Humphrey, 77 Ill. 388.

¹⁰² Kellerman v. Arnold, 74 Ill. 632.

¹⁰³ *Ante*, Injuries to the Person, Sec. 7.

¹⁰⁴ Freese v. Tripp, *supra*; Roth v. Eppy, *supra*.

¹⁰⁵ Schneider v. Hosier, 21 Ohio St. 98.

to work, prevented the other hands and teams from working to advantage, and the progress of the job was hindered and delayed, and the contractors were thus injured in their property and means of support." The Supreme Court sustained a verdict awarding actual and exemplary damages against the defendants.¹⁰⁶ In Wisconsin, in a case where a husband, in consequence of becoming intoxicated by liquor sold to him by the defendant, received certain injuries, it was held that the wife was entitled to recover: 1. Compensation for watching, nursing and taking care of him during his sickness; 2. Damages for injury to her own health in consequence; 3. The expenses of employing medical attendance and assistance; 4. The cost of hiring labor to attend to his business.¹⁰⁷ And in Illinois, where the husband of the plaintiff had become a confirmed drunkard, abandoning an occupation in which he was earning five dollars a day, and had squandered a valuable property, a verdict of \$10,000 actual, and \$2,000 exemplary damages was considered not excessive.¹⁰⁸ In Michigan, the statute has received a somewhat stricter construction. In a recent case in that state,¹⁰⁹ the court say: "There can be no exemplary damages without actual injury. It is to be observed that injuries received from the intoxication of strangers are embraced in the same clause with those suffered from the intoxication of wards, relatives or husbands and wives, and that persons who have no blood or marital connection with the intoxicated person are also grouped together. It is plain, therefore, that the measure of damages can not be the same in all cases, and that there must be some of them where exemplary damages would be absurd. There is nothing in these cases to exempt them from the rules applied to any other cases of actionable wrongs. The actual damages should be as nearly commensurate with the

¹⁰⁶ *Duroy v. Blinn*, 11 Ohio St. 332.

¹⁰⁷ *Wightman v. Devere*, 33 Wis. 570.

¹⁰⁸ *Jewett v. Wanshura*, 8 Ch. L. N. 324.

¹⁰⁹ *Ganssly v. Perkins*, 30 Mich. 492.

actual injury as the nature of the case will permit; and exemplary damages should be given in those cases alone where the plaintiff has some personal right to complain of a wanton and willful wrong which the wrong-doer, when he committed it, must be regarded as having committed against the plaintiff himself, in spite of the injury he must have known she was likely to suffer by it. The foundation of exemplary damages rests on the wrong done willfully to the complaining party, and not on wrong done without reference to the party." And, in another place, they say: "The plaintiff's testimony indicated that she had *not* been deprived of the sober society of her husband; defendants were liable for the mischief which they may have produced, by preventing his improvement or making him worse; but they are not responsible for damages as they would have been, if they had reduced him from sobriety to sottishness. The moral quality of contributing to the degradation of one already debased is no better than if he were sober. But the remedy is given for the injury suffered by the wife; and she loses much less in property and comfort when her condition is not seriously changed, than when there is considerable change." And, in New York, it is held that exemplary damages should be given only where there are circumstances of abuse or aggravation proved in the case on the part of the vendor of liquor.¹¹⁰

The defendant may prove that he had forbidden his servants to supply the intoxicated person with liquor, and that they willfully disobeyed him without his connivance,¹¹¹ or that he endeavored to prevent his obtaining the liquor, and had frequently refused him, or that he had procured it by artifices,¹¹² not in bar of the action, but in mitigation of exemplary damages. For a like purpose it has been held in New York, that he may prove that he was, on the occasion complained of, lawfully selling under the author-

¹¹⁰ *Franklin v. Schermerhorn*, 8 Hun, 112.

¹¹¹ *Freese v. Tripp*, *supra*; *Kreiter v. Nichols*, 28 Mich. 499.

¹¹² *Bates v. Davis*, 76 Ill. 223.

ity of a license granted by the state or town.¹¹³ But such evidence is not admissible in Illinois.¹¹⁴ In Indiana, in an early case, it was held that where the sale was illegal, thus rendering the seller liable to a criminal prosecution, he could not be punished with vindictive damages in a civil action.¹¹⁵ But it has been since held that the act of 1873 has expressly abrogated this rule.¹¹⁶ In Illinois, on proof of illegal sales, exemplary damages may be recovered.¹¹⁷

The statutes providing that any person who shall be injured in person, property or means of support, *in consequence* of the intoxication, habitual or otherwise, of any person, shall have a right of action, it would seem to require an extraordinary interpretation to hold that the defendant is not responsible for all consequences arising from the sale of intoxicating liquors, but only for consequences which he may be presumed to have foreseen as likely to be the result of his sales. Yet, in a recent Indiana case,¹¹⁸ where a husband became grossly intoxicated from liquor sold to him by defendant, and while being hauled home in his wagon in this state, received injuries from a barrel of salt falling upon him, from which injuries he died, it was held that his widow had no right of action under the statute, the death of the husband being the immediate, and the intoxication of the husband only the remote cause of the injury to her. In support of this view the court say: "The defendants, in causing the intoxication of the deceased, could not have anticipated that, on his way home, he would be fatally injured by the salt barrel. This was an extraordinary and fortuitous event, not naturally resulting from the intoxication. Suppose, by way of illustration, that a person, by

¹¹³ 8 Alb. L. J. 337.

¹¹⁴ Roth v. Eppy, *supra*.

¹¹⁵ Struble v. Nodwift, 11 Ind. 65.

¹¹⁶ Schafer v. Smith, 4 Cent. L. J. 271.

¹¹⁷ Mason v. Shay, 7 Ch. L. N. 152.

¹¹⁸ Krach v. Heilman, 4 Cent. L. J. 233, citing Marble v. Worcester, 4 Gray, 395; Crain v. Petrie, 6 Hill, 522; Ryan v. N. Y. C. R. R., 35 N. Y. 210; Fairbanks v. Kerr, 70 Penn. 86.

reason of intoxication, lies down under a tree, and a storm blows a limb down upon him and kills him, or that lightning strikes the tree and kills him; could it be said, in a legal sense, that his death was caused by intoxication? In the chain of causation, the intoxication may have been the remote cause of his death, because, if he had not been intoxicated, he would not have placed himself in that position, and therefore would not have been struck by the limb or lightning. In the case supposed it may be assumed as clear, that the parties causing the intoxication would not be liable under the statute to the widow, as for an injury to her caused by the intoxication of the deceased. Yet there is no substantial difference between the case supposed and the real case here." It is likely that, on the general principles applicable to such a case, the conclusion reached by this court is correct; for, to make the defendant liable, it is not enough to say, that as the injury would not have occurred but for his act in selling the liquor, and thereby intoxicating the person who was killed, therefore the defendant is responsible; for he can only be held liable where his act, in the absence of any independent intervening agency, would be likely to be followed by an injury to another. But a fair construction of the statute, and the intent of its framers, would seem to justify the adoption of a different rule in this peculiar class of cases. Such has been the tendency of the courts generally.¹¹⁹

The Supreme Court of Indiana, in a still more recent case,¹²⁰ has applied the same rule to the case of one who, while intoxicated, was run over and killed by a train of cars. The death of the person (the husband of the plaintiff in the case referred to), caused by the train of cars, the court say, "is an effect which is not naturally, necessarily, or even probably connected with the fact of unlawfully selling intoxicating liquors to him by the defendant,

¹¹⁹ See *Roth v. Eppy*, 16 Am. L. R. 111; *Schmidt v. Mitchell*, Supreme Court of Illinois, not yet reported; *Emory v. Addis*, 6 Ch. L. N. 336.

¹²⁰ *Callier v. Early*, 4 Cent. L. J. 406; *Monthly Jurist*, May, 1877.

whereby he became drunk ; and when the death could take place only upon the coincidence of his stepping on the track and the train passing at the same time, the consequence becomes more remote and more disconnected with the cause alleged. The death need not take place immediately and directly upon the cause, but it must be effected by a chain of natural effects and causes, unchanged by human action ; or the party who committed the first act will not be responsible. In this case, the running of the train of cars was the human action, which changed the course of natural effects and causes connected with the act alleged against the defendant. * * * The plaintiff's husband was killed by the train of cars, and not by the act of the defendant in unlawfully selling him intoxicating liquor." In an article upon the Ohio liquor law, published in the *Monthly Jurist* for May, 1877, and which has come under our notice since this review went to press, the decision of the Indiana court in these two cases is very ably criticised. "It seems apparent," says the writer, "that a saloon keeper, in selling intoxicating liquor, must contemplate that the person buying the same may, and even probably will, if he becomes intoxicated, be hurt by some one of the many instruments of danger found in cities and towns where liquors are sold. Stripped of his reason and the use of his limbs, what is more natural or probable than that the purchaser will meet injury or death? Just how he may be injured,—by what train, or in what place—the saloon keeper probably can not tell ; but that injury will probably befall him, the seller must contemplate. So if one sells liquor to another by which he becomes intoxicated, and the seller then places him in a wagon, with another drunken man for a driver, is it not probable that an accident will happen to them? A wrong-doer is liable for the natural, necessary and even probable consequences of his acts. The intention of the legislature in passing this law seems to have been to provide for cases like these, and give a remedy where none existed. Prior to the adoption of this law, a wife was

without a remedy, if her husband became intoxicated and was killed by the cars. On account of the deceased being drunk, she could not recover in an action against the railroad company. It was clearly the intention of the legislature to apply the law to cases like these; and to do so, requires no extension of the act by judicial construction." In dismissing this phase of the subject, it may be sufficient to say, that in no other state where these statutes exist has such a narrow construction been placed upon their provisions, or such an apparent attempt been made to defeat the wholesome remedy which their framers have endeavored to give.

SEC. 11. *Pleading—Limitation.*—The action under these statutes is confined to persons who are injured in person, property or means of support; no right of action is given on the mere ground of relationship.¹²¹ Though it was probably the intention of the legislature to give a single right of action and single damages to but one person for a single injury, it would seem that such right may arise under these statutes to a husband or wife and each of their children, be they ever so many, as well as to all other persons mentioned in the section.¹²²

In a very recent Illinois case the declaration averred that the defendant sold and gave to one E intoxicating liquors, "and thereby caused him to become, and he was during that time before named, habitually intoxicated." It was contended that this was an averment that the intoxication was caused in whole by the defendant; that such must be the proof; and that it was not sufficient, to sustain the count, to show that the intoxication was caused in part by the defendant. But the court overruled the objection. "The statute," they say, "gives the right of action where the defendant shall have caused the intoxication in whole or in part. Contracts are entire, and must be proved substantially as alleged; but torts are divisible, and in them the

¹²¹ Ganssly v. Perkins, 30 Mich. 495.

¹²² Franklin v. Schermerhorn, 8 Hun, 112.

plaintiff may prove a part of his charge and recover, if there be enough proved to support the tort.¹²³ But a complaint on the bond under the Indiana statute, which averred that the intoxication was caused in part by liquors sold by the defendant's principal, and that while so intoxicated, and by reason of such intoxication, the purchaser caused damage, has been held bad.¹²⁴ Under the New Hampshire statute, a declaration in trespass alleging an assault and battery as having been committed directly by the defendant, is sufficient where the plaintiff seeks to recover damages for an assault upon him committed by a person while in a state of intoxication caused by liquors unlawfully furnished him by defendant.¹²⁵ In Indiana, it is held that the complaint must distinctly aver that the injury complained of, and the damages sought to be recovered, resulted in consequence of a sale of intoxicating liquors; and therefore an averment that, whilst A was intoxicated by reason of liquor sold him by C, he inflicted a mortal wound on the husband of the plaintiff, causing his death, does not sufficiently show that the wound was inflicted by reason of the intoxication of A.¹²⁶ But a complaint by a wife, alleging that her husband became intoxicated by liquor purchased from the defendant, and thereby neglected his work, squandered his money, and damaged the plaintiff in her means of support, is good.¹²⁷

In actions under these statutes, the intoxicated person is not a necessary party defendant.¹²⁸

The *ground* of action for personal injuries is the tortious act against the person injured, although the *right of action* therefor is conferred by the statutes upon the wife or personal representatives, and the statute of limitations runs from the time of the selling of the liquor which caused the

¹²³ Roth v. Eppy, 16 Am. L. Reg. 111; Hill v. Blanford, 45 Ill. 8.

¹²⁴ Schafer v. Cox, 49 Ind. 460.

¹²⁵ Bodge v. Hughes, 53 N. H. 615.

¹²⁶ Schafer v. Cox, 49 Ind. 460.

¹²⁷ Barnaby v. Wood, 50 Ind. 405.

¹²⁸ English v. Beard, 51 Ind. 489.

intoxication, and not from the date of the injury.¹²⁹ But the right of action so far vests at the time of the injury, that the statute does not divest it upon the death of the husband, nor does it abate upon common-law principles. The party doing the injury has no interest in it and no control over it. The right of action vests in the injured person to be prosecuted in his or her own name, and for his or her own use. The wife does not lose her identity by the death of her husband. The relation of wife, though essential by the terms of the statute to the inception of the right of action, is not necessary in the prosecution of the remedy, and after the death of the husband she may bring her action for the cause of his death under the statute, though "widow" be not expressly named in it.¹³⁰ The statute does not require that she be a wife at the time of bringing her action, but only at the date of the wrongful act.¹³¹ So an employer may sue for injuries done to him by the intoxication of his servant, after the relation of master and servant has terminated.

SEC. 12. *Evidence—What Acts will bar a Recovery.*—The injuries sought to be established in these cases not being recognized or redressed under the rules of the common law, the evidence necessary or competent to prove them and their extent is not confined within the bounds of that admissible to establish a common-law tort.¹³² Under the rule, however, adopted by the Ohio courts in this class of cases, the plaintiff is required to prove his case beyond a reasonable doubt.¹³³ What constitutes intoxication is a question of fact to be determined by the jury upon the whole evidence in the light of their own observation.¹³⁴

¹²⁹ *Emmett v. Grill*, 39 Iowa, 690.

¹³⁰ *Hackett v. Smelsley*, 77 Ill. 109.

¹³¹ *Schneider v. Hosier*, 21 Ohio St. 116; *Jackson v. Brookins*, 5 Hun, 530.

¹³² *Dunlavey v. Watson*, *supra*; *Guenerech v. Smith*, 34 Ia. 348; *Kniffen v. McConnell*, 30 N. Y. 285.

¹³³ *Mason v. Shay*, 7 Ch. L. N. 152.

¹³⁴ *Roth v. Eppy*, 16 Am. Law Reg. 111.

As to the meaning of the term intoxicating liquors, as used in these

The injury to the means of support of a married woman, caused by the sale of intoxicating liquors to her husband, by which he acquires habits of intemperance and idleness, may vary greatly, according to the age, condition and circumstances of herself and husband. Evidence therefore in such cases that the husband was a sober, industrious man, providing for and supporting his family prior to the time when the defendant caused his intoxication by selling to him intoxicating liquors, and after such sales and in consequence thereof he became less industrious than he had been before; that such sales caused him to neglect his business or work, or squander his means to any extent so as to decrease the means of support of his wife, is admissible; and the jury may be instructed to take these circumstances into consideration on the question of damages.¹³⁵ But it is improper for the court to charge as a matter of law that the selling of intoxicating liquors to a person far gone in habits of intoxication, and who had become diseased bodily and mentally, would be more aggravating than selling to one not so badly addicted to intemperance, or who had

statutes, see *Worley v. Spurgeon*, 38 Iowa, 465; *Jewett v. Wanshura*, 8 Ch. L. N. 324; and in criminal prosecutions, *State v. Stapp*, 29 Iowa, 551. The court will take judicial notice of the fact that spirituous liquors are intoxicating. *Carmon v. State*, 18 Ind. 450; *Com. v. Peckham*, 2 Gray, 514. But not that common brewers' beer is intoxicating. *Klare v. State*, 43 Ind. 483. In *Jackson v. State*, 19 Ind. 312, it was held that, where an indictment charged the sale of wine, the court did not judicially know that it was not intoxicating. It was argued by the defendant that wine was not intoxicating, and that it was not in the power of the legislature to declare it so. In *State v. Moore*, 5 Blackf. 118, it was held, that "fermented" was not "spirituous" liquor. Evidence that lager beer is not intoxicating is inadmissible in a complaint for selling "intoxicating liquors." *Com. v. Bubser*, 14 Gray, 83. It has been held that ale, being produced by fermentation and not by distillation, is not "spirituous liquor." *People v. Crilley*, 20 Barb. 248; *State v. Moore*, 5 Blackf. 418; *Nevin v. Ladue*, 3 Denio, 437; *Com. v. Markoe*, 17 Pick. 465; *Com. v. Jordan*, 18 Pick. 228. But in *State v. Wittmar*, 12 Mo. 407, ale, beer, porter, rum, gin, brandy, whiskey and wine, are held to be within the term "intoxicating liquors." See also *Houser v. State*, 18 Ind. 106.

¹³⁵ *Dunlavey v. Watson*, 38 Ia. 400.

more vigor of body or mind. All such questions are for the jury.¹³⁶ Evidence is admissible to prove the fact of the intoxication of the party who caused the injury during a certain period, before it has been shown that such intoxication was caused by the defendant.¹³⁷ So it is proper to prove the practice of the drunkard in visiting other saloons, in order to show what proportion of the money he had spent for liquors had been paid to defendant.¹³⁸ The inability of the husband to obtain employment on account of his habits of intoxication may be shown, but not his desire for intoxicating liquors.¹³⁹ Evidence is inadmissible to prove sales of liquor made prior to the passage of the acts giving the remedy,¹⁴⁰ or subsequent to the commencement of the action;¹⁴¹ and evidence that the wife, since the suit was brought, had purchased liquors and drunk them with her husband, is admissible only where damages are sought by her for injury to her feelings and disgrace caused by her husband's intoxication.¹⁴²

Under that section of the statutes, allowing the recovery of compensation for taking care of a person while intoxicated, it is held that, if the person so intoxicated had recovered from the effect of the liquor sold him by the defendant, and was sober at the time of receiving the injury, or if he had become sober and afterwards got intoxicated upon liquors sold by others, the first seller would not be held liable. Therefore, in such a case, any evidence is admissible which may tend to show that the injured party had become sober before the accident, or had injured himself while under the effects of an intoxication subsequent to that caused by the defendant. So, also, evidence is proper which may show the length of time required to recover from an intoxica-

¹³⁶ *Ludwig v. Sager*, Supreme Court of Illinois, January Term, 1877.

¹³⁷ *Woolheather v. Risley*, 38 Ia. 486.

¹³⁸ *Hemmens v. Bentley*, 32 Mich. 89.

¹³⁹ *Roth v. Eppy*, *supra*.

¹⁴⁰ *Dubois v. Miller*, 5 Hun, 332.

¹⁴¹ *Woolheather v. Risley*, *supra*.

¹⁴² *Kearney v. Fitzgerald*, *supra*.

tion,¹⁴³ and the delivery of the liquor to the person is sufficient evidence of a sale.¹⁴⁴ The evidence must be confined to the cause stated in the declaration or petition; and where the injury alleged is to means of support, it is error to admit proof of injury to property.¹⁴⁵

Under those acts which give a remedy in case only of sales or gifts made in violation of their provisions, the proof is required to be more direct, such an action being in its nature *quasi* criminal. Where the action is brought for damages caused by the sale of liquors to an habitual drunkard, it must be shown that the defendant knew him to be such,¹⁴⁶ although it need not be proved that he was intoxicated at the time the liquor was furnished.¹⁴⁷ But knowledge of the intemperate habits of the person may be proved by reputation.¹⁴⁸ And in the case of a sale to a minor, the burden of proof is upon the defendant to show that he believed him to be of full age.¹⁴⁹ And it has been held that a sale to a minor, who asks for the liquor in behalf of one to whom it might lawfully be sold, is in contravention of the statute.¹⁵⁰ The furnishing of liquors to a minor, as prohibited in the statute, is complete, although the liquor may have been purchased by another, and supplied by the seller in pursuance of such purchase.¹⁵¹ And the statement of a physician who was in the habit of getting intoxicated, made at the time of his purchases of liquor, that he wanted it for a patient, and for medical purposes, did not, it has been held, in the absence of proof to the contrary, raise the presumption that the sales were made to the patient.¹⁵²

¹⁴³ Brannan v. Adams, *supra*.

¹⁴⁴ State v. Fairfield, 37 Me. 517.

¹⁴⁵ Hackett v. Smelsley, 77 Ill. 109.

¹⁴⁶ Markert v. Hoffner, 4 Am. L. Rec. 111.

¹⁴⁷ Fountain v. Draper, 49 Ind. 441.

¹⁴⁸ Elam v. State, 24 Ala. 77; Wickwire v. State, 19 Conn. 477; State v. Kalb, 14 Ind. 404.

¹⁴⁹ Farback v. State, 24 Ind. 77; Rineman v. State, *Id.* 80; Seltz v. State, 41 Ind. 162.

¹⁵⁰ State v. Fairfield, 37 Me. 517.

¹⁵¹ State v. Munson, 25 Ohio St. 381.

¹⁵² Boyd v. Watt, *supra*.

The intent of these statutes is to furnish redress and compensation to innocent sufferers from the consequences of the sale of intoxicating liquors ; and, therefore, if a person has by his acts and conduct voluntarily and knowingly encouraged and contributed to bring about such a condition in another, he can not be permitted to complain of any wrongs which he may suffer at the hands of one while in a state which he has assisted to produce. Therefore the seller would not be protected from the consequences of his own actions, if he should receive injury at the hands of one of his intoxicated customers. On the same principle, a wife suing for injury to her means of support, may be estopped by her acts from recovering any damages for an injury to which she may have contributed.¹⁵³ Therefore, in an action by the wife, if it be proved that she voluntarily bought liquors of the defendant to be drunk as a beverage by herself and her husband, she can not be considered as an innocent sufferer from the effects of intoxicating liquors, if injured by him while intoxicated, and will not be entitled to the protection of the statute. But the purchase by her of liquor for the use of her husband at home, in order to prevent him from squandering time and money at saloons, is not such a complicity on her part as to bar her recovery for such injuries.¹⁵⁴ The fact that the wife accompanied her husband to various places and gatherings, and drank liquors with him, and that the husband kept liquors in his home and drank the same at home with the wife's knowledge and approval, and that all of such drinking on the part of her husband was with her knowledge and consent, is proper to be considered by the jury on the question of damages, especially as the statute allows exemplary damages. But such facts do not constitute a bar to the action,¹⁵⁵ and the wife may prove that her husband compelled her to attend such

¹⁵³ *Kearney v. Fitzgerald*, Supreme Court of Iowa, not yet reported; *Engleken v. Hilger*, *Id.*

¹⁵⁴ *Kearney v. Fitzgerald*, *supra*.

¹⁵⁵ *Hackett v. Smelsley*, 77 Ill. 109.

places, and may be permitted to show the whole circumstances of the case as explanatory of her conduct. And where the plaintiff's husband was an habitual drunkard, and she had forbidden the sale of liquors to him by the defendant, but a day or two after such notice she went to the defendant's saloon in company with her husband, and in his presence directed the defendant to sell him all the liquor he asked for, it was held, in an Iowa case, that the only reasonable inference from such conduct was that the plaintiff acted under the coercion of her husband, and that the jury had a right to find that the defendant drew this inference, and therefore knew that she was not acting voluntarily.¹⁵⁶ In a New York case, it was held that the plaintiff's allowing his son to take his horse to drive to a neighbor's, though knowing the son to be of intemperate habits, was not such contributory negligence as to defeat his right of action for the value of his horse, where the son had gone to a saloon and procured liquor, and, while under its influence, driven the horse so violently that it died.¹⁵⁷

¹⁵⁶ Jewett v. Wanshura, *supra*.

¹⁵⁷ Bertholf v. O'Reilly, *supra*.







